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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KRYGOSKI CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

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202 PP

QUESTION PRESENTED

In light of precedent that common law principles apply when the government contracts with private parties, can the government terminate contracts for its own convenience and avoid breach damages, in the absence of changed factual circumstances, without rendering such contracts unenforceable for lack of mutual consideration?

RULE 29.6 STATEMENT

Petitioner Krygoski Construction Company has no parent corporation and has no nonwholly owned subsidiaries.

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UNITED STATES OF AMERICA,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Krygoski Construction Company ("Krygoski") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit. The Federal Circuit held that the government may exercise the "termination for convenience" clause in the contract at issue to limit its damages without demonstrating a change in circumstances justifying the termination. The Federal Circuit reversed the Court of Federal Claims, which, relying on *Torncello v. United States*, 681 F.2d 756 (Cl. Ct. 1982) (*en banc*) (App. 1f), had found that a change in circumstances was necessary before the government could properly exercise the termination clause and that the government had failed to demonstrate such a change.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) is reported at 94 F.3d 1537 (Fed. Cir. 1996). The opinions of the United States Court of Federal Claims finding for petitioner on the issues of liability (App. 1b) and damages (App. 1c) are not reported.

JURISDICTION

The Court of Appeals entered judgment on August 1, 1996. Krygoski filed a timely petition for rehearing and suggestion for rehearing in banc, which the Court of Appeals denied on November 7, 1996. App. 1d. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The appendix (App. 1e) sets forth verbatim the following regulatory provisions: Federal Acquisition Regulation ("FAR") sections 49.501, 49.502, and 52.249-2 (48 C.F.R. §§ 49.501, 49.502, 52.249-2 (1996)).

STATEMENT OF THE CASE

This petition asks the Court to review for the first time a question of profound significance to all persons who contract with the federal government—whether limits exist on the government's ability to reserve to itself the power to terminate contracts and avoid paying breach damages. In its reversal of the Court of Federal Claims, the Court of Appeals in this case held that the government may exercise the "termination for convenience" clause, mandatory in government contracts, without having to justify the termination by reference to a change in circumstances.

The Court should grant the petition for three reasons. First, the resolution of the issue is extremely important to private contractors, who perform billions of dollars worth of government contracts, and to the federal government, which enters into thousands of contracts, the enforceability of which is called into question by the Federal Circuit panel decision in this case. This issue arises frequently in government contract disputes.

Second, the case law on this matter is confusing and inconsistent. Decisions from the Federal Circuit (the only court of appeals with jurisdiction to consider the issue), the Court of Federal Claims, and the various boards of contract appeals have addressed this issue using different analyses and obtained different and sometimes conflicting results.

Third, the panel's decision conflicts in principle with Supreme Court precedent. For over one hundred years, this Court has recognized the principle, most recently affirmed in *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), that the federal government must comply with common law rules when it enters into contractual agreements with private parties. One such rule requires that a contract be supported by mutual consideration. The panel's decision fails to address whether permitting the government to terminate a contract and avoid breach damages in the absence of changed circumstances, as required by *Torncello*, would make a contract fail for want of mutual consideration.

A. The Statutory/Regulatory Structure of the "Termination for Convenience" Clause

The contract at issue in this case contained a "termination for convenience" clause, which gives to the government the power to terminate a government contract. Essentially, the clause purports to enable the government unilaterally to stop performing a contract while escaping liability for certain breach damages. The clause provides, in relevant part:

> The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest.

App. 4e. The termination clause allows the government to escape paying breach damages by limiting the government's liability to: the contract price for completed services; the costs incurred on work already performed; the profits earned on work already performed; and the costs of termination. Under the clause, the contractor may not recover any form of anticipatory profits.

The language of the clause used in this case is standard and required by federal regulation. *See* App. 4e-13e. The vast majority of government contracts include some version of the clause. *See* App. 1e-4e.

1. The History of Terminations for the Convenience of the Government

The clause is an extension of a legal principle set forth by this Court shortly after the Civil War. *See United States v. Corliss Steam-Engine Co.*, 91 U.S. 321 (1876). In *Corliss*, this Court upheld the authority of the Navy to suspend or modify wartime contracts and settle with contractors when the circumstances surrounding the contract, i.e., the existence of war, change. *See id.* at 323. The *Corliss* decision reflected the Court's recognition that "continuing with wartime contracts after [a] war was over clearly was against the public interest." App. 15f-16f (discussing the *Corliss* decision and its rationale).

During World War I, the *Corliss* doctrine was codified in statute and applied to war contracts. *See* Urgent Deficiency Appropriation Act of 1917, ch. 29, 40 Stat. 182, 183. Federal law permitted the government unilaterally to cancel or modify contracts for ships or material. This power could be exercised, however, only until six months following a final treaty of peace. *See id.*; *see also College Point Boat Corp. v. United States*, 267

U.S. 12 (1925); App. 17f (both construing the scope of the Act).

The wartime contracts of World War II continued to permit the government to terminate and escape paying breach damages. Federal law authorized agencies to amend, cancel, and settle war contracts when such action would facilitate the prosecution of the war effort. *See* Contract Settlement Act of 1944, sec. 1(b), 41 U.S.C. § 101(b) (1994) (indicating that one of the Act's purposes was "to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts"); First War Powers Act of 1941, ch. 593, sec. 201, 55 Stat. 838, 839 (repealed 1966) (permitting the amendment and modification of war contracts). Special clauses, specifically authorized by statute and regulation, were included in war contracts giving the government the right to terminate the contracts "for the convenience of the Government." App. 18f-19f. Although the language of the clauses was broad, the purpose "still was to allocate the risk of changed circumstances," e.g., the termination of hostilities, to the contractor. App. 19f.

Today, the Office of Federal Procurement Policy Act authorizes government-wide procurement regulations. *See* 41 U.S.C.A. §§ 403-434 (West 1987 & Supp. 1996). Under the general authority of this statute, termination for convenience clauses have been incorporated into peacetime contracts of both the Defense Department agencies and civilian agencies. *See* App. 1e-4e.

2. The *Torncello* Decision

In 1982, the United States Court of Claims[1] sitting *en banc* considered at length the issue of what limits existed on the government's ability to exercise the termination clause in the *Torncello* decision.[2] *See* App. 1f. Although the termination clause contained broad language regarding the "convenience" of the government, the response of the Court of Claims was to follow historical interpretation of the clause and "allow termination for convenience only when the expectations of the parties had been subjected to a substantial change," essentially shifting the risk of such a change to the contractor. App. 20f.

In *Torncello*, the government entered into a "requirements" contract with a company for grounds maintenance and refuse removal for certain Navy housing. One of the items of the contract required the Navy to

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[1] At the time, the Court of Claims served as both a trial and an appellate court. Cases were tried by trial commissioners, whose decisions were subject to review by a panel of the Court sitting as an appellate body, which also heard appeals from the various boards of contract appeals.

In late 1982, the Court of Claims was abolished. In its place were created the United States Claims Court, a trial court, and the United States Court of Appeals for the Federal Circuit, an appellate forum. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, secs. 101, 171-177, 96 Stat. 25, 27-28. In 1992, the name of the Claims Court was changed to the United States Court of Federal Claims. *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, sec. 902, 106 Stat. 4506, 4516.

[2] Decisions of the Court of Claims were adopted as binding precedent by the Federal Circuit and can be overturned only by the Federal Circuit sitting *en banc*. *South Corp. v. United States*, 690 F.2d 1368, 1370 n.2 (Fed. Cir. 1982). Thus, *Torncello* is binding on panels of the Federal Circuit. *En banc* decisions of the Court of Claims were exceptional.

order all pest control services from the contractor. The Navy, however, used another source for pest control because the other source was cheaper. The contractor asserted that the Navy had breached the contract by using another source for pest control. The government claimed that it could escape breach damages through the use of the contract's termination for convenience clause.

The contracting officer and the Armed Services Board of Contract Appeals ("ASBCA") denied Torncello's claim. On further appeal, the case was heard by a panel of the Court of Claims, but one member of the panel passed away after oral argument. "[B]ecause of the exceptional importance of the legal issues involved," the Court of Claims, *sua sponte*, considered the case *en banc*. *See* App. 1f n.*. At issue was under what conditions the government could exercise its rights under the termination clause and escape liability for breach of contract damages. The court reversed the decision of the ASBCA.

Torncello produced both a plurality and three concurring opinions. There were no dissents. As discussed below, the subsequent confused application of *Torncello* is in large measure due to the number and content of the separate opinions.

The plurality opinion, in which three of the six judges joined, is a scholarly examination of basic contract principles and the history of the termination for convenience clause. The opinion recognizes "as one of the most elementary propositions of contract law that a party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void." App. 7f.

The plurality opinion traced the development of the termination for convenience clause as "a way for the government to avoid the continuance of contracts that the rapid changes of war, or the war's end, had made useless or senseless." App. 14f. The plurality held that

the termination clause, if broadly construed to limit government liability under almost any condition, would render illusory the government's original promise to perform its obligations under the contract. Consequently, the contract would be void and unenforceable for lack of consideration, permitting either party to abandon performance at any time. *See* App. 29f-30f.

The plurality held that the mere requirements that the government not act in bad faith and that contracting officials refrain from abusing their discretion were insufficient to provide consideration. *See* App. 30f-32f. Neither requirement was enough to prevent the government from exercising the clause in a completely exculpatory fashion, thus rendering the government's promise to perform illusory. So, in an effort to construe the clause in such a way as to make the contract enforceable, the plurality interpreted the clause to include the historical limitations on its use.

The plurality "restrict[ed] the availability of the clause to situations where the circumstances of the bargain or the expectations of the parties have changed sufficiently that the clause serves only to allocate risk." App. 32f-33f. By limiting the use of the clause to changed circumstances, the plurality made the use of the clause dependent upon a condition outside the control of the government. Consequently, the government was obliged to perform unless such a condition should occur, thereby avoiding a completely exculpatory interpretation that would have rendered the contract illusory.

The plurality specifically overturned *Colonial Metals v. United States*, 494 F.2d 1355 (Ct. Cl. 1974). In *Colonial Metals*, the contracting officer had decided to terminate a government contract and reissue the contract to another contractor solely in order to get a better price, "a reason that was known or should have been known to the government *before* the contract was awarded." App. 21f. No changed circumstances were present in *Colonial Metals*, and the plurality overruled the case as being

inconsistent with the requirement of consideration. One of the concurring opinions agreed that *Colonial Metals* should be overturned, thus making a majority on this point. *See* App. 36f (Davis, J., concurring).

Three concurrences were filed in *Torncello*. One found for the contractor on the ground that the government intended, when it entered the contract, to obtain the items elsewhere for a lower price. The one-paragraph opinion does not expand upon the basis for this holding. App. 35f (Friedman, C.J., concurring). The other two concurrences acknowledged the need for consideration in government contracts, but held that a bad faith or abuse of discretion test was a sufficient limit on the government's right to terminate to allow a finding that the contract was supported by consideration. App. 36f-37f (Davis, J., concurring); App. 38f (Nichols, J., concurring).[3]

Unfortunately, the *Torncello* decision has not put to rest the question of when the government could exercise its power to terminate government contracts. "*Torncello* has been cited for various legal propositions in 90 board of contract appeals decisions, 46 Claims Court and Court of Federal Claims decisions, and 12 Federal Circuit decisions." App. 7g; *see also* App. 17b n.13.

The Federal Circuit has by no means been consistent in its application of *Torncello*. As explained in detail below, the several major decisions since *Torncello* have

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[3] Before this Court can determine that the bad faith or abuse of discretion standards are sufficient limitations on the government's ability to exercise the termination clause, the Court must necessarily address the meaning of those limitations in light of the confusion surrounding their definition. *See* App. 37b-42b (setting forth various definitions of bad faith); John Cibinic, Jr., *Convenience Terminations: What Are the Limits?*, 10 *Nash & Cibinic Rep.* 147, 150-51 (1996) (App 1g, 8g-12g) (describing the confusion surrounding the bad faith and abuse of discretion standards).

each construed *Torncello* differently. At no point, however, despite having been given repeated opportunities to do so in this case and others, has the Federal Circuit resolved the fundamental issue in *Torncello*—what logical bounds must surround the application of the termination for convenience clause in light of the requirement that government contracts must be supported by consideration in order to be enforceable.

B. Background of the Case

In 1985, Krygoski was awarded a contract by the United States for the demolition of an airfield and missile site. The contract called for the complete demolition and removal of physical structures including the abatement of all asbestos located at the site. *See* App. 4b, 23b-33b. Prior to the issuance of the invitation for bids for the contract, the government had examined the site but had not conducted any comprehensive survey to identify the full extent of asbestos contamination. Because the exact amount of asbestos was not known by either party at the time of contract award, the total price of the contract was not firm; rather the contract contained unit prices for the removal of the asbestos estimated to exist, as well as unit prices for the removal of asbestos in excess of the estimates. *See* App. 4b-6b.

Following the award of the contract, Krygoski visited the site and advised the government that the amount and type of asbestos to be removed exceeded the contract estimates. *See* App. 7b-8b. The government initially advised Krygoski that the discovery of the additional asbestos was not problematic,[4] but refused to make a joint inspection as required by the contract. *See* App. 9b-10b. Nonetheless, before Krygoski could begin the

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[4] The trial court noted with interest the fact that all of the government's witnesses testified that the contract contemplated the complete abatement of asbestos at the site. App. 27b n.24.

demolition process, the government terminated the contract on September 5, 1986, exercising the termination for convenience clause. *See* App. 11b.

C. This Litigation

On April 19, 1989, Krygoski filed an action in the United States Court of Federal Claims pursuant to 28 U.S.C. § 1491 and the Contract Disputes Act, 41 U.S.C. § 609, as a claim against the United States based upon an express contract. A trial on the liability phase of the case was held and, in an opinion dated March 2, 1993, the court found that the United States was liable for breach of contract, including damages for anticipatory profits lost due to the government's breach. *See* App. 1b. A subsequent damages trial resulted in a judgment for Krygoski of $1,456,851.20, plus interest. *See* App. 34c.

In reaching a decision on the issue of liability, the trial judge found that the government had failed to demonstrate the existence of changed circumstances sufficient to invoke the termination for convenience clause as required by *Torncello*. The court found from the terms of the contract and the witnesses presented at trial that the government expected the discovery of additional asbestos and anticipated the need for its removal at the time of contract award. Consequently, the government could not use the termination clause as a means of escaping breach of contract damages, including Krygoski's lost profits on the contract.

Recognizing the uncertainty in the applicable law, the trial court went on to consider whether, as an alternative to its finding of lack of changed circumstances, the government acted in bad faith in terminating the contract. *See* App. 22b, 37b. Noting the confusion surrounding the definition of bad faith and holding that bad faith can be shown by an abuse of government discretion, the trial court found that the government had acted in bad faith. App. 37b-46b.

The court found that the contracting officer's rationale—a "rule of thumb" that a cost increase in excess of a certain percentage of the contract automatically constitutes a "cardinal change" in the contract, warranting termination—was unsupported by regulation or case law.[5] *See* App. 43b. In addition, the government failed to examine the site as required and failed to confirm the extent of the asbestos present. It also failed to confirm the estimated increase in cost, which ultimately turned out to be less than the contracting officer's "rule of thumb" amount. *See* App. 44b-45b. These actions and inactions constituted an abuse of discretion and demonstrated the government's bad faith in terminating the contract, rendering the government liable for breach of contract damages.

D. The Court of Appeals Decision

A panel of the Federal Circuit reversed the trial court's holding that the United States was liable for breach damages. At the outset, the panel complimented the trial court's "careful work" and noted that the "trial court thoroughly analyzed the factual circumstances and legal principles of this case." App. 5a. At no point did the panel reverse any of the trial court's findings of fact.

The panel explicitly declined to apply the changed circumstances test set forth in *Torncello*. App. 16a-17a. In its view, "*Torncello* applies only when the Government enters a contract with no intention of fulfilling its promises." App. 17a (relying on *Salsbury Indus. v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990)). The panel instead confined its review to the trial court's finding of bad faith, which the panel reversed.

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[5] Indeed, the trial court found no evidence that such a "rule of thumb" even existed. *See* App. 43b.

Under the panel's opinion, the government may terminate a contract for convenience under any circumstances *except* when the government acts in bad faith, *see* App. 7a-8a, requiring proof "tantamount to a showing of malice or conspiracy," *Kalvar Corp. v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976). The concept of consideration is not addressed in the panel opinion, despite having been raised by Krygoski, and despite the concept's central role in *Torncello*. The opinion also does not address or distinguish the *Torncello* plurality's examination and rejection of the same bad faith test as a satisfactory limitation on government use of the termination clause, or the concurring decision of Judge Davis in which this definition of bad faith is rejected. Although Krygoski requested the Federal Circuit *en banc* to consider these shortcomings in the panel decision, the Federal Circuit declined to do so. *See* App. 1d.

REASONS FOR GRANTING THE WRIT

A. The Question Presented, which Arises Frequently in Disputes, Calls into Doubt the Enforceability of Government Contracts

The federal government is a party to tens of thousands of contracts involving billions of dollars annually. Virtually all of these contracts contain a termination clause similar to the one involved in this case. The question whether the clause renders these contracts unenforceable for lack of consideration is of paramount concern to both private industry and the government. Without a definitive answer, neither party to a government contract knows its actual obligations, and the possibility exists that either party may "walk away" from a contract at any time during performance.

The requirement that an enforceable contract must be supported by consideration is fundamental to the common law. *See, e.g., Restatement (Second) of Contracts* §§ 71-109 (1981) (setting forth the various principles of

consideration). Furthermore, it is universally recognized that an agreement reserving to one party the power to withhold performance and terminate the agreement at will is unsupported by consideration. *See id.* § 77 cmt. a, illus. 2; 2 Joseph M. Perillo & Helen Hadjiyannakis Bender, *Corbin on Contracts* § 5.28 (1995). A promise made without supporting consideration creates no legal duty and generally is unenforceable. 2 Perillo & Bender, § 5.4; 3 Richard A. Lord, *Williston on Contracts* § 7:11, at 169-72 & 172 n.5 (4th ed. 1992).

Whether the government must comply with this principle when entering into contracts with private parties is a question that goes to the very heart of contracting and government interaction with the private sector. Until the question is answered definitively, contractors are faced with the uncertainty of not knowing: whether the contracts they sign with the government are enforceable; whether they are free to walk away from improvident contracts; or whether the contracting officer may terminate a contract when the contracting officer sees fit to do so, even if such termination occurs the day after the contract is signed. Contractors are forced to consider the possibility that they will receive a termination notice from the contracting officer at any time stating, in essence:

> I entered the contract with you intending in good faith to comply with its terms; since that time, however, I reviewed my decision and changed my mind. You are hereby terminated.[6]

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[6] The trial court quoted with approval trial counsel's formulation of a similar hypothetical termination letter under the circumstances of this case:

> Dear Mr. Krygoski: Your contract with the government is hereby terminated because you found 49,000 square feet of additional asbestos material outside the scope of our contract, I think. In any

(Footnote cont'd on next page)

The *Torncello* decision is the only decision to address the consideration issue fully and directly, and all but one of the judges in that decision explicitly recognized that consideration is necessary to support the enforceability of government contracts. *See* App. 26f-28f (plurality opinion); App. 35f (Davis, J., concurring); App. 38f (Nichols, J., concurring) (all recognizing the requirement of consideration).

Whether or not the *Torncello* resolution of the consideration problem is correct, it is clear from the reported case law that the issue of when the government may exercise the standard termination for convenience clause continually arises. The Federal Circuit has addressed the issue a number of times since *Torncello*, including the instant case, but has confused, rather than resolved, the issue. *See Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578 (Fed. Cir. 1995); *Salsbury Indus. v. United States*, 905 F.2d 1518 (Fed. Cir. 1990); *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988). Over the years since *Torncello*, the Court of Federal Claims has also addressed the issue many times. *See, e.g., Advanced Materials, Inc. v. United States*, 34 Fed. Cl. 480, 482-83 (1995); *Modern Sys. Tech. Corp. v. United States*, 24 Cl. Ct. 699, 704, *aff'd mem.*, 980 F.2d 745 (Fed. Cir. 1992); *Government Sys. Advisors, Inc. v. United*

(Footnote cont'd from previous page.)

> event, you made an unsolicited change order request for $324,000 for additional absestos in the floor tile and flashing, probably. Well, even if neither conclusion is true, said contract is still terminated because it suits me to do so, and I have found a way to get a better price, thanks to you.

App. 34b-35b; *see also* Irwin Newman, *The Beginning of the End—The Encroachment of Federal Contract Termination Practices*, 33 *Bus. Law.* 2143, 2143 (1978), *cited in Torncello*, App. 24f (example of similar hypothetical termination letter).

States, 21 Cl. Ct. 400, 409-10, *vacated on other grounds*, 25 Cl. Ct. 554 (1990); *Nationwide Roofing & Sheet Metal Co. v. United States*, 14 Cl. Ct. 733, 735-37 (1988); *Municipal Leasing Corp. v. United States*, 7 Cl. Ct. 43, 47 (1984). Similarly, as the trial court noted, the various boards of contract appeals have had to consider the issue on a large number of occasions. *See* App. 17b n.13 (listing various board decisions). The sheer number of these decisions indicate that the issue is continually arising and resulting in litigation between contractors and the federal government. Resolution of the issue by this Court would clarify the obligations of both the government and government contractors.[7]

Finally, the panel decision will have important effects on government contracts. "[B]y expanding the Government's opportunities for contractual abrogation," the Federal Circuit panel decision will have "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *See United States v. Winstar Corp.*, 116 S. Ct. 2432, 2459 (1996) (Souter, J., for the plurality). In addition, the possibility exists that contractors may stop work on money-losing contracts and claim that the contracts, because they contain termination for convenience clauses, are unenforceable for lack of

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[7] Petitioner is aware of the pending petition for a writ of certiorari in *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012 (Fed. Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3444 (U.S. Dec. 10, 1996) (No. 96-928). Both this petition and the *Wells Fargo* petition allege that the Federal Circuit has failed to properly apply precedent, including that of this Court, in actions seeking breach of contract damages. The two cases, however, have critical factual differences. In *Wells Fargo*, the contract is not governed by federal procurement regulations and therefore does not contain a termination for convenience clause. Granting a writ of certiorari in either case will not resolve the issues in the other.

consideration. Litigation over the issue will undoubtedly continue.

B. The Federal Circuit Case Law Surrounding the Question Presented Is Confusing and Inconsistent

A wide divergence exists in the case law applying *Torncello*. The trial court explicitly recognized the vast degree of confusion surrounding the issue of what limitations exist to the government's exercise of the termination for convenience clause. Much of its liability decision is devoted to reviewing the conflicting decisions surrounding the issue. In its opinion, the trial court pleaded for guidance on the issue:

> Since the matter is not entirely free from doubt, and in fact there has been considerable confusion about the correct legal standard (witness the various boards' decisions to the contrary, legal commentaries in various legal journals and publications cited herein, the *Salsbury* case, and the several United States Claims Court cases that comment on it), it may prove beneficial for the Federal Circuit to revisit this area of jurisprudence at some future date to clarify its present position in this regard.

App. 20b n.15. In its opinion, the Court of Appeals confirmed the "vacillation" apparent in decisions from trial courts and boards of contract appeals. *See* App. 10a. Unfortunately, the panel opinion failed to address the issue of consideration, the central focus of the decision in *Torncello*, and the Federal Circuit refused to consider the issue *en banc*.

A brief review of the Federal Circuit case law demonstrates the confusion generated by this issue.[8] *Torncello* was followed by *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988). In *Maxima*, the federal government was precluded from terminating for convenience a service contract after the expiration of the contract period. The panel applied the changed circumstances test and rejected the government's argument that the government's failure to order the contractual minimum amount of services constituted the requisite change in circumstances. *See id.* at 1555.

Subsequent panel decisions, however, attempted to isolate the *Torncello* decision without addressing the issues underlying the decision. In *Salsbury Industries v. United States*, 905 F.2d 1518 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991), a contract award to one contractor from the Postal Service was terminated after a second bidder that had been wrongfully excluded from the competition sought and obtained a court injunction directing the suspension of the contract. The terminated contractor sought to recover incentive payments it would have earned had the contract not been terminated. *See id.* at 1519-20.

A panel of the Federal Circuit, by majority decision, applied the bad faith test and upheld the lower court's denial of recovery. With respect to *Torncello*, the panel noted that:

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[8] The Federal Circuit has *exclusive* jurisdiction to hear appeals from the Court of Federal Claims and the various boards of contract appeals. *See* 28 U.S.C. § 1295 (1994). As a result, no inter-circuit conflict can exist with respect to the application of *Torncello* to government contracts, and the absence of such conflict should not be used as grounds for denying this petition. As the accompanying review of the Federal Circuit case law indicates, the confusion and conflict that exist within the circuit are sufficient to justify Supreme Court review.

> [*Torncello*] stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause.

Id. at 1521. The dissent in the case was filed by a U.S. district judge, sitting by designation. He argued that the majority was reading *Torncello* in an overly restrictive fashion, substituting a test based upon the government's pre-contractual intent to perform rather than its pre-contractual knowledge of circumstances surrounding the contract. *See id.* at 1523 (Duff, D.J., dissenting). In any event, the panel's majority opinion did not wholeheartedly reject the changed circumstances test. *See id.* at 1522 ("The [court injunction obtained by the excluded bidder] was an *unanticipated change in circumstances*, not merely justifying but compelling termination of the contract.") (emphasis added).[9]

The *Torncello* changed circumstances test was further restricted in *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578 (Fed. Cir. 1995). The panel in that decision, relying on *Salsbury*, confined the holding of *Torncello* to instances in which the contractor demonstrates bad faith, defined as an intent prior to award to terminate the contract on the part of the government. *See id.* at 1581-82. The panel's decision again fails, however, to address the issue of consideration.

These decisions are not only confusing, but to some extent are in direct conflict. *Salsbury, Caldwell &*

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[9] The petition for certiorari in *Salsbury* (No. 90-447) did not address the issue of whether the panel erred in its construction of *Torncello*. Instead, the petition focused on the extent to which the Postal Service should be able to rely on the court injunction, which arguably was a result of the Postal Service's own misconduct, as an excuse for escaping breach damages.

Santmyer, and the panel decision in this case all hold that the changed circumstances test applies only when the government enters a contract with the intent not to perform. Yet, in *Maxima*, the court applied the changed circumstances test when there was no such government intent.[10] Thus, the same facts presented to different panels could well result in different outcomes.

It is important to note that the "reinterpretation" of *Torncello* through *Salsbury*, *Caldwell & Santmyer*, and now *Krygoski* represents the view of only five of the eleven active judges on the Federal Circuit. Another active judge wrote the *Maxima* decision, which was joined by a senior judge who was a member of the *Torncello* plurality. Two of the remaining three senior judges participated in *Torncello*, but neither have taken part in the subsequent panel decisions. Clearly, within the circuit itself, no majority view exists as to the proper limits of the termination for convenience clause. Because the Federal Circuit is the exclusive appellate forum for these disputes, the confusion in its case law impacts all government contractors and all contracts with similar termination clauses. *See supra* note 8.

Similar confusion exists in the decisions of the Court of Federal Claims. No consistency exists between those decisions that use the changed circumstances test of *Torncello* or the more restrictive bad faith test adopted by *Salsbury*. *Compare Erwin v. United States*, 19 Cl. Ct. 47, 53-54 (1989); *B&H Supply Co. v. United States*, 17 Cl. Ct. 544, 547 n.6 (1989); *Municipal Leasing Corp. v.*

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[10] The panel decision below attempted to harmonize its holding with the holding in *Maxima*. *See* App. 10a n.2. However, the panel's attempt is unpersuasive; the panel's discussion of *Maxima* focuses on the government's conduct at the time of the termination, and not on the government's intent when it entered the contract. *See id.* Moreover, neither the *Salsbury* nor *Caldwell & Santmyer* decisions even mentions *Maxima*.

United States, 7 Cl. Ct. 43, 47 (1984) (noting changed circumstances to be a prerequisite for exercise of termination clause and the avoidance of breach damages) *with Advanced Materials, Inc. v. United States*, 34 Fed. Cl. 480, 482-83 (1995); *Modern Sys. Tech. Corp. v. United States*, 24 Cl. Ct. 699, 704 n.5, *aff'd mem.*, 980 F.2d 745 (Fed. Cir. 1992) (construing *Torncello* to require a pre-contractual intent not to perform on the part of the government). Some decisions have used *both* the changed circumstances and bad faith tests. *See SMS Data Prods. Group, Inc. v. United States*, 19 Cl. Ct. 612, 619-21 (1990); *Embrey v. United States*, 17 Cl. Ct. 617, 624-25 (1989); *Nationwide Roofing & Sheet Metal Co. v. United States*, 14 Cl. Ct. 733, 735-37 (1988). In light of these confusing and conflicting decisions, and in the absence of resolution by this Court of the consideration issue, any informed practitioner must continue to raise the issue presented herein and seek breach of contract damages in the absence of changed circumstances for the reasons stated by the trial court. *See* App. 22b.

As two noted government contract legal commentators have stated, after reviewing the post-*Torncello* Federal Circuit decisions, including *Krygoski*: "We wonder whether this mess will ever be straightened out." App. 17g. This confusion that surrounds the circumstances under which the government may exercise the termination for convenience clause justifies the grant of the petition in this case.

C. The Decision Below Conflicts in Principle with Established Supreme Court Precedent

Finally, the decision of the Federal Circuit creates a conflict in principle with well-established precedent. Over seventy years ago, this Court held that a lack of consideration would render a government contract void and unenforceable. *See Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (1923). In *Willard*, a contractor entered into a coal supply contract with the govern-

ment that lacked the explicit quantity of coal to be provided. The contract specifications provided that the quantities provided in the invitations for bids were estimates only, and that "the Government [was] not being obligated to order any specific quantity." *Id.* at 490.

Ultimately, the government ordered more coal than was estimated, which the contractor delivered. The contractor then sought to recover the difference between the market price (which had increased substantially since the time the contract was awarded) and contract price of the coal provided in excess of the estimated quantity. This Court held that:

> There is nothing in the writing which required the Government to take, or limited its demand, to any ascertainable quantity. It must be held that, for lack of consideration and mutuality, the contract was not enforceable.

Id. at 493. The Court went on to hold that such an unenforceable contract becomes binding only to the extent it is actually performed, and any executory portion of the contract is unenforceable by either party to the contract. *See id.* at 494. A similar decision was reached in *William C. Atwater & Co. v. United States*, 262 U.S. 495, 498 (1923) (similar contract was enforceable only to the extent that it had actually been performed). *See also United States v. Winstar Corp.*, 116 S. Ct. 2432, 2477 (1996) (Scalia, J., concurring) (if government does not agree to be bound by its contractual promises, such promises are illusory); *United States v. White Oak Coal Co.*, 5 F.2d 439, 441 (4th Cir. 1925) (government's right of revocation at any time caused contract to lack consideration); *Ralph Constr. Inc. v. United States*, 4 Cl. Ct. 727, 733 (1984) (government contract lacking consideration was enforceable only to the extent of actual performance).

To the extent that the Federal Circuit's decision in this case construes the termination clause to permit the government to cancel a contract at any point, it necessar-

ily renders the contract void and unenforceable, as described by the case law set forth above. Such a construction conflicts with the principle, also set forth by this Court, that contracts should be interpreted, if possible, in such a way as to make them legal and enforceable and give effect to the parties' agreement. *See Hobbes v. McLean*, 117 U.S. 567, 576 (1886); *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977); *see also Torncello*, App. 8f-9f (relying on the principle and listing additional case law in support thereof).

More generally, the *Krygoski* decision conflicts with the principle, set forth in a long line of case law from this Court, requiring the government to fulfill the terms of contracts into which it enters or face liability under the general law of contracts. *See, e.g., Sinking-Fund Cases*, 99 U.S. 700, 719 (1879) ("The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."); *Perry v. United States*, 294 U.S. 330, 350-54 (1935) (recognizing the binding quality of promises and agreements made by the government). That view has continued to the present day. " 'When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.' " *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2464-65 (1996) (Souter, J., for the plurality) (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

These conflicts in principle with established Supreme Court precedent regarding the requirement of consideration, the proper construction of contracts, and the government's obligations to fulfill its contractual promises justify the grant of *certiorari* in this case.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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February 5, 1997

APPENDIX

(Reported at 94 F.3d 1537)

United States Court of Appeals for the Federal Circuit

95-5136

KRYGOSKI CONSTRUCTION COMPANY, INC.,

Plaintiff-Appellee,

v.

The UNITED STATES,

Defendant-Appellant.

DECIDED: Aug. 1, 1996.

Before RICH, RADER, and BRYSON, *Circuit Judges.*

RADER, *Circuit Judge.*

The United States Court of Federal Claims determined that the United States Army Corps of Engineers (Corps) had no justification for terminating a demolition contract with Krygoski Construction Company, Inc. (Krygoski) for the Government's convenience. *Krygoski Constr. Co. v. United States*, No. 214-89C (Fed. Cl. Mar. 2, 1993). To remedy the breach, the trial court awarded Krygoski $1,456,851.10 in damages plus interest pending payment. *Krygoski Constr. Co. v. United States*, No. 214-89C (Fed. Cl. May 19, 1995). Because the trial court incorrectly relied on *Torncello v. United States*, 681 F.2d 756 (1982), this court reverses and remands.

BACKGROUND

In 1985, the Corps undertook demolition of an abandoned U.S. Air Force airfield and missile site near Raco, Michigan. During surveys of the site, the Corps found asbestos contamination. Based on blueprints and its survey, the Corps estimated that two buildings at the site contained asbestos contamination in 1600 linear feet of pipe insulation and 650 square feet of tank and duct insulation. The survey also revealed that extensive vandalism may have spread asbestos debris on the floors of the buildings.

On August 12, 1985, the Corps issued an invitation for bids on the demolition project. The solicitation noted that bids should range between $500,000 and $1,000,000. Eight bidders bid on the contract. Krygoski won the contract with the low bid of $414,696. On or about September 30, 1985, Krygoski and the United States through the Detroit District of the Army Corps of Engineers entered into Contract No. DACA35-85-C-0001. This contract required removal and disposal of the asbestos during restoration of the site. Seven line items in the contract specifically addressed asbestos abatement:

		Unit	Unit Price
1.	Asbestos Pipe Insulation Removal and Disposal		
	a. First 1600 Linear feet	1600 L.F.	$10.98
	b. Over 1600 Linear feet	700 L.F.	$10.75
2.	Asbestos Tank and Duct Insulation Removal and Disposal		
	a. First 650 Square feet	650 S.F.	$ 8.90
	b. Over 650 Square feet	100 S.F.	$ 8.78
3.	Demolition, Removal and Disposal	1 Job	$260,940.00

4.	Underground Tank Excavation and Backfill		
	a. First 6700 Cubic Yards	6700 C.Y.	$ 3.00
	b. Over 6700 Cubic Yards	3300 C.Y.	$ 2.00
5.	Fill		
	a. First 12,000 Cubic Yards	12,000 C.Y.	$ 2.50
	b. Over 12,000 Cubic Yards	5,000 C.Y.	$ 2.00
6.	Missile Silo Fill	28 EA.	$1,000.00
7.	Topsoil, Seeding and Mulching	39,000 S.Y.	$ .70

The contract contained a Variations in Estimated Quantities (VEQ) Clause for items 1, 2, 4, and 5 above:

> Variation from the estimated quantity in the actual work performed under any second or subsequent sub-item . . . will not be the basis for an adjustment in contract unit price.

This VEQ Clause anticipated variations in asbestos quantities for these four items at the Raco site. The VEQ Clause, however, did not contemplate quantity variations for asbestos removal in other areas.

Krygoski conducted a predemolition survey. Just ten days after Krygoski acknowledged receipt of the notice to proceed with the contract, Mr. Phillips, Krygoski's counsel, informed the Corps of asbestos in the vinyl flooring and roof insulation of the Raco buildings. Krygoski proposed to remove the tile for a unit price of $8.78 per square foot--the cost of removing additional duct insulation under item 2 of the VEQ Clause. The Corps re-

quested Thermo Analytical, Inc. to take samples at potential new locations of asbestos contamination. The tests showed asbestos in the tile and the flashing at the Composite building, but not in the roof insulation.

From examining the drawings, the Corps' Area Office estimated asbestos removal needs at 36,340 square feet. At Krygoski's removal price of $8.78 per square foot, this amount of removal yielded an additional cost of about $320,000 for the floor tile. The Corps did not, however, actually test each tile. The Corps derived its estimate from the drawings.

The contracting officer, Lieutenant Colonel Phillip Johnson (LTC Johnson), considered a price increase of this dimension a cardinal change in the contract. LTC Johnson reached this conclusion because this increase exceeds 33% of the total contract cost. For a change of this magnitude, the Corps followed a general policy of terminating the contract for the convenience of the Government and reprocuring the work competitively under the Competition in Contracting Act. LTC Johnson also considered that Krygoski had not started work on the contract. In fact, Krygoski had done little beyond transporting four pieces of equipment to the Raco site. In light of these circumstances, the Corps terminated the contract for the convenience of the Government on September 5, 1986.

Following the termination, the Corps resolicited bids for the Raco site demolition. The Corps revised its specifications to reflect the additional asbestos removal work as well as other changes. The Corps received eight offers on this new solicitation, DACA35-87-B-001. Krygoski was the sixth lowest bidder at $1,200,000. Anderson Excavating & Wrecking Co. (Anderson) won the bidding at $443,200. Due to modifications to the contract, the Corps eventually paid Anderson a total of $542,861.60 to complete the contract.

Krygoski sued in the Court of Federal Claims alleging that the Corps breached its original contract. Relying on *Torncello*, 681 F.2d at 772 (reading the termination for convenience clause to require some change in the circumstances of the bargain or in the expectations of the parties), the trial court found the Government improperly terminated Krygoski's contract. In the alternative, the trial court found the Government abused its discretion in terminating the contract under the *Kalvar* standard. *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301-02 (1976), *cert. denied*, 434 U.S. 830 (1977). Accordingly, the trial court awarded Krygoski $1,456,851.20 in damages plus interest. This amount included anticipatory lost profits. The Government appeals.

DISCUSSION

This court reviews Court of Federal Claims decisions for errors of law and clearly erroneous findings of fact. *Cooper v. United States*, 827 F.2d 762, 763 (Fed. Cir. 1987) (citing *Milmark Servs., Inc. v. United States*, 731 F.2d 855, 857 (Fed. Cir. 1984)).

The trial court thoroughly analyzed the factual circumstances and legal principles of this case. Its careful work properly framed the issues for this appeal. As the trial court perceived, the case law governing the decision to terminate a contract for convenience has not always set a clear, unambiguous standard. See *Torncello*, 681 F.2d at 764-72 (recounting history of terminations for convenience). An examination of termination for convenience law from several decades ago discloses mixed signals about limiting terminations under the bad faith/abuse of discretion standard in *Kalvar*, 543 F.2d at 1301-06, or the change of circumstances test in *Torncello*, 681 F.2d at 772. A full review of more recent case law, coupled with recent enactments, however, discloses a

clear signal for implementation of termination for convenience clauses.

I.

At the outset, this court traces some of the history leading up to articulation of two tests for convenience terminations. The Government always possessed the power to terminate its contracts; such action, however, constituted a contract breach. John Cibinic, Jr. & Ralph C. Nash, Jr., *Administration of Government Contracts* 1073 (3d ed. 1995) [hereinafter Cibinic & Nash]. Terminations for the Government's convenience developed as a tool to avoid enormous procurements upon completion of a war effort. Because public policy counselled against proceeding with wartime contracts after an end to hostilities, the Government, under certain circumstances, began to terminate contracts and settle with the contractor for partial performance. In 1863, the Army, for example, promulgated Rule 1179 in the Army Regulations concerning contracting for subsistence stores. Rule 1179 expressly "provide[d] for [subsistence contract] termination at such time as the Commissary-General may direct." *United States v. Speed*, 75 U.S. (8 Wall.) 77, 78 (1868). The Supreme Court has acknowledged the Government's authority to settle breach claims after a convenience termination. *Cf. United States v. Corliss-Steam Engine Co.*, 91 U.S. 321, 323 (1875) (finding the Navy Department had authority to suspend work under a contract and enter into a breach settlement for partial performance); *see also* Cibinic & Nash, at 1073-74.

After World War I, the Government terminated contracts in large numbers. New statutory authority provided for settlement of the claims from those terminations. *See* Dent Act, 40 Stat. 1272 (1919). When World War II started, the Contract Settlement Act of 1944, 58 Stat. 649, provided further statutory and regulatory

provisions for contract termination. *See* Cibinic & Nash, at 1074.

In 1964, the first edition of the Federal Procurement Regulation (FPR) included optional termination for convenience clauses. FPR 1-8.700-2. By 1967, the FPR required termination for convenience clauses in most procurement contracts. 32 Fed. Reg. 9683 (1967). Thus, termination for convenience—initially developed for war contracts—evolved into a principle for Government contracts of far-ranging varieties, both civilian and military. *See* 48 C.F.R. § 49.502 (1995). The exigencies of war no longer limited the Government's ability to terminate a contract for convenience. Although wartime situations no longer limit use of the practice, the Government's authority to invoke a termination for convenience has, nonetheless, retained limits. A contracting officer may not terminate for convenience in bad faith, for example, simply to acquire a better bargain from another source. *Torncello*, 681 F.2d at 772. When tainted by bad faith or an abuse of contracting discretion, a termination for convenience causes a contract breach. *See Allied Materials & Equip. Co. v. United States*, 215 Ct. Cl. 902, 905-06 (1977); *National Factors, Inc. v. United States*, 204 Ct. Cl. 98, 492 F.2d 1383, 1385 (1974); *Keco Indus., Inc. v. United States*, 492 F.2d 1200, 1203-04 (1974); *John Reiner & Co. v. United States*, 163 Ct. Cl. 381, 325 F.2d 438, 442 (1963), *cert. denied*, 377 U.S. 931 (1964).

The contractor's burden to prove the Government acted in bad faith, however, is very weighty. *Kalvar*, 543 F.2d at 1301 ("Any analysis of a question of Governmental bad faith must begin with the presumption that public officials act 'conscientiously in the discharge of their duties.' " (quoting *Librach v. United States*, 147 Ct. Cl. 605, 612 (1959))). Due to this heavy burden of proof, contractors have rarely succeeded in demonstrating the Government's bad faith. *See* Cibinic &

Nash, at 1078; *Kalvar*, 543 F.2d at 1301; *Librach*, 147 Ct. Cl. at 612.

II.

In 1982, this court's predecessor articulated in dicta another test for the sufficiency of convenience terminations. *Torncello*, 681 F.2d at 758. In *Torncello*, the Navy awarded a requirements contract, but then purchased some work covered by the contract from a competing bidder at a lower price. *Id.* In an earlier case, *Colonial Metals Co. v. United States*, 494 F.2d 1355 (1974), the Court of Claims had allowed a termination for convenience under these circumstances. In *Colonial Metals*, the Navy terminated a contract for copper ingot solely to obtain a better price. In fact, the Navy knew of the better price at the time of contract award. The Court of Claims permitted this termination because "such a motive [contracting for a lower price elsewhere] is not improper." 494 F.2d at 1359.

Torncello offered the opportunity to revisit and overrule the *Colonial Metals* case. Indeed *Colonial Metals* was inconsistent with the *Kalvar* bad faith limit on terminations for convenience. Even factoring in *Kalvar*'s presumption of good faith actions by public officials, 543 F.2d at 1301, the Navy in *Colonial Metals* contracted in bad faith. At the time of award, the Navy knew of the better price it later terminated the contract to obtain.

In *Torncello*, the Navy—knowing it could acquire the same services at a lower price from another contractor—again contracted with Torncello and Soledad Enterprises in an exclusive requirements contract. The Navy then began satisfying its requirements from that cheaper source. Torncello claimed the Navy breached the requirements contract. The Armed Services Board of Contract Appeals found the contract constructively terminated for the Government's convenience, disallowing

Torncello contract breach damages. This court's predecessor overruled *Colonial Metals* because the Navy used the termination for convenience clause to escape a promise it never had an intention to keep. *Torncello*, 681 F.2d at 772. Indeed, then Chief Judge Friedman concurred with that narrow understanding of the court's action:

> As I understand the court's opinion, the court holds only that when the government enters into a requirements contract, knowing that it can obtain an item the contract covers for less than the contract price and intending to do so, there cannot be a constructive termination for convenience of the government when the government follows that course. On that basis, I join in the opinion.

Id. at 773;[1] see also *Salsbury* Indus. v. United States, 905 F.2d 1518, 1521 (Fed.Cir.1990), cert. denied, 498 U.S. 1024, 111 S.Ct. 671, 112 L.Ed.2d 664 (1991) (construing the *Torncello* holding).

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[1] Six judges participated in the *en banc Torncello* opinion. A plurality of three judges joined the reasoning that postulated a broad alternative "change of circumstances" test for convenience terminations. The remaining three judges, then Chief Judge Friedman and Circuit Judges Davis and Nichols, each concurred separately under much narrower reasoning. Judge Davis stated: "I do not agree that 'abuse of discretion' is an inadequate or unsatisfactory general standard for gauging the contracting officer's use of the termination clause." *Torncello*, 681 F.2d at 773. Judge Nichols agreed: "Moreover, a termination of a contract for convenience is valid only in the absence of bad faith or a clear abuse of discretion." *Id.* at 774 (citations omitted). Judges Davis and Nichols expressly condemned the plurality's opinion as "unnecessarily broad," *id.* at 773, "needlessly circuitous," *id.* at 774, and "needlessly sweeping," *id.* Indeed, then Chief Judge Friedman's terse concurrence (stated in its entirety above) carries a similar silent condemnation.

Despite the adequate justification to overrule *Colonial Metals* under the existing *Kalvar* test, a plurality of judges in *Torncello* proceeded to articulate in dicta a broader test for gauging the sufficiency of a convenience termination. The plurality stated that the Navy could not invoke a convenience termination unless some change in circumstances between the time of award of the contract and the time of termination justified the action. *Torncello*, 681 F.2d at 772. As in this case, trial courts and boards have occasionally vacillated between applying the long-standing *Kalvar* test or the *Torncello* test.[2]

III.

Recent enactments, however, have underscored rules of Government contracting which render the plurality's dicta in *Torncello* inapplicable to the present regime of

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[2] *See Sneeden v. United States*, 33 Fed.Cl. 303, 310-11 (1995) (utilizing the *Kalvar* test); *Continental Collection & Disposal, Inc. v. United States*, 29 Fed.Cl. 644, 652-53 (1993) (applying the bad faith/abuse of discretion standard citing both *Torncello* and *Kalvar*); *Nationwide Roofing & Sheet Metal Co. v. United States*, 14 Cl. Ct. 733, 735-37 (1988) (implementing both the *Torncello* and the *Kalvar* tests); *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988) (employing the *Torncello* Test). In *Maxima*, the Government invoked a constructive termination for convenience, a year after contract performance. The Government had ordered the contractor, *Maxima*, to refund payments that had been made under the contract. The Board of Contract Appeals of the Department of Interior held the Government's actions were proper. This court reversed, citing, in part, *Torncello*. The facts in *Maxima* fit within the narrow circumstances of *Torncello*. In *Maxima*, the Government purported to honor its contract, only to profess a year after contract completion that it had terminated that contract. Thus, *Maxima* stands for the proposition the Government cannot retroactively create a breach in order to change the Government's obligations under a completed contract. 847 F.2d at 1553-54.

contract administration. Recent statutes fully address the concerns of the *Torncello* plurality regarding the Government's shopping for lower prices after contract award. The Competition in Contracting Act (CICA), Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended in scattered sections of 10, 31 and 41 U.S.C.), compels the promulgation of regulations and procedures to ensure full and open competition. See 41 U.S.C. §§ 401, 405(a) and 416 (1994).

In 1984, CICA articulated significant factors addressing a contracting officer's decision to terminate a contract for the Government's convenience. CICA requires executive agencies, when procuring property or services, to "obtain full and open competition through use of competitive procedures." 41 U.S.C. § 253(a)(1)(A) (1994). Thus, CICA ensures that contracting officers receive bids at competitively low prices. For each solicitation, a contracting officer must maintain full and open competition in the procurement process, unless one of the limited exceptions applies. *See* 10 U.S.C. § 2304 (1994). CICA mandates impartial, fair, and equitable treatment for each contractor. *See* 10 U.S.C. §§ 2304 and 2305 (1994).

This competitive fairness requirement, with its bid protest remedies, restrains a contracting officer's contract administration. If, for instance, a contracting officer discovers that the bid specifications inadequately describe the contract work, regulations promulgated under CICA may compel a new bid. *See* 10 U.S.C. § 2305; 48 C.F.R. § 1.602-2. Thus, to accommodate CICA's fairness requirements, the contracting officer may need to terminate a contract for the Government's convenience to further full and open competition. 48 C.F.R. §§ 1.602-2(b); *see* 41 U.S.C. § 414 (1994). Thus, to further its full competition objective, CICA permits a lenient convenience termination standard.

Not every necessary alteration of the contract scope, however, requires a new bid procedure. *See* 41 U.S.C. §§ 423(e)(1), 423(e)(2) (1994) (providing procedures for certifications before a contract modification or extension). Only "modifications outside the scope of the original competed contract fall under the statutory competition requirement." *AT & T Communications, Inc. v. WilTel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993). CICA does not fully define a "standard for determining when modification of an existing contract requires new competition or falls within the scope of the original competitive procurement." *Id.* This court, nonetheless, has stated that a "cardinal change" is a drastic modification beyond the scope of the contract:

> Under established case law, a cardinal change is a breach. It occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. By definition, then a cardinal change is so profound that it is not redressable under the contract, and thus renders the government in breach.

Id. (citing *Allied Materials & Equip. Co. v. United States*, 569 F.2d 562, 563-64 (1978)); *see also Air-A-Plane Corp. v. United States*, 408 F.2d 1030, 1032-33 (1969). In *WilTel*, the question was not whether the Government modifications breached a contract, but was "whether Government modifications changed the contract enough to circumvent the statutory requirement of competition." 1 F.3d at 1205. In other words, the court inquired whether the modification was within the scope of the competition for the original contract. *Id.*

IV.

In the wake of CICA, with its protections for competition, this court has revisited the dicta in the *Torncello*

plurality opinion. *Salsbury*, 905 F.2d at 1518. In *Salsbury*, a district court determined that the Postal Service had wrongfully eliminated a bidder from the procurement process which granted Salsbury Industries the contract. Under the court order, the Postal Service suspended work on Salsbury's contract and subsequently terminated the contract for convenience. Recognizing the role of convenience terminations in the CICA regime, this court stated that "[i]t is not the province of the courts to decide de novo whether termination was the best course. 'In the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive.' " *Id.* at 1521. (quoting *John Reiner*, 325 F.2d at 442). With this guidance, this court applied the standards of *Keco* to test the arbitrariness of the termination decision.[3]

This court also directly addressed the applicability of the *Torncello* plurality opinion:

> [*Torncello*] stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause.

Id. Thus, this court rejected the reasoning of the *Torncello* plurality.

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[3] The Court of Claims enumerated four factors to apply in determining whether contracting officers abused their discretion: (1) the procurement official's bad faith, (2) the reasonableness of the decision, (3) amount of discretion delegated to the procurement official; and (4) violations of an applicable statute or regulation alone may be arbitrary.

Again, more recently, this court has confronted an invitation to apply the reasoning and test of the *Torncello* plurality. *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578 (Fed. Cir. 1995). In *Caldwell*, the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) solicited bids for the construction of its Plant Germplasm Quarantine Laboratory in Beltsville, Maryland. The solicitation's specifications included an ambiguous term. *Caldwell*, 55 F.3d at 1580. The lowest bidder withdrew its bid when it discovered the ambiguity about some costs APHIS expected the contractor to bear. Caldwell received a routine preaward letter. *Id.* At that point, APHIS discovered that Caldwell had also interpreted the ambiguous specification differently from the Government. Because the ambiguity impeded full and open competition, APHIS terminated Caldwell's contract for the Government's convenience. *Id.* Without corrective action, performance of the contract would prejudice the other bidders. This court recited again the passage from *Salsbury* that interpreted *Torncello* in consonance with the opinions of then Chief Judge Friedman and Judges Davis and Nichols. Moreover, this court underscored that assessment: "*Salsbury* teaches that bad faith . . . is a prerequisite for a *Torncello* claim." *Id.* at 1582.

In sum, on two recent occasions after enactment of CICA, this court has expressly repeated the narrow applicability of *Torncello*. *Id.* at 1582; *Salsbury*, 905 F.2d at 1521. Indeed this court's recent pronouncements are fully consistent with the policy goals of CICA and other Government procurement statutes. Under these policies, contracting officers have no incentive to terminate a contract for convenience except to maintain full and open competition under CICA. With an adequate contractor in place, the contracting officer has no interest to reprocure. Moreover, where an officer must choose between modifying or terminating a contract, ease of administration usually imparts a bias in favor of modification. Thus

Salsbury and *Caldwell* suggest that this court will avoid a finding of abused discretion when the facts support a reasonable inference that the contracting officer terminated for convenience in furtherance of statutory requirements for full and open competition.

V.

Turning now to this case, the termination for convenience clause of the contract provided:

> The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest.

See 48 C.F.R. § 52.249-2 (1995). This contract language governs the legal relations of the parties. Under the discretion conferred by this contract language, Contracting Officer LTC Johnson decided to terminate the contract with Krygoski because removing the asbestos-containing vinyl tile would constitute a cardinal change from the originally competed contract. The contracting officer felt that a change increasing the total contract price between 25% and 33% warranted resolicitation. The trial court stated that LTC Johnson cited "no authority for his definition of cardinal change." Because the Government ultimately removed only 9,000 square feet of tile, not 36,000 square feet, the trial court concluded that the Corps arbitrarily and capriciously miscalculated the scope of asbestos abatement. To the contrary, the contracting officer had a reasonable basis for terminating the contract for the Government's convenience. Asbestos removal was originally estimated to cost about $40,000 out of an estimated $415,000 demolition contract. Thus asbestos removal accounted for about 10% of the total cost of the contract. At that point, the contracting officer's experts increased the cost of asbestos removal by about $320,000. After this change, the total asbestos removal cost was about $360,000 on a contract near

$775,000—just under 50% of the total contract. Asbestos removal, originally about 10%, became about 50% of the contract work.

Under these circumstances, the contracting officer had ample justification for conducting a reprocurement competitively under CICA. With this change in the scope of contract work, different bidders, like asbestos removal firms, may have entered the competition on the contract. *See* 48 C.F.R. §§ 14.203-1, 14.203-2 (1995) (enumerating the methods of soliciting bids where invitations for bids or presolicitation notices are mailed to prospective bidders or are displayed in public places, like trade journals).

In determining whether a modification falls within CICA's competition requirement, this court in *WilTel* examined whether the contract as modified materially departs from the scope of the original procurement. *WilTel*, 1 F.3d at 1205. In this case, the contracting officer, LTC Johnson, determined that the removal of the asbestos-contaminated floor tile amounted to a cardinal change, a modification outside the scope of the original competed contract. The contract has no provision to increase the cost of the contract under the VEQ Clause for removal of asbestos-contaminated floor tile. In fact, if the removal of floor tile was within the scope of the contract, Krygoski may have the obligation to remove the tile without increasing the contract price. The contracting officer, recognizing the equities of this situation, terminated the contract for convenience to comply with CICA.

The trial court erred by invoking and relying upon the *Torncello* plurality test. The trial court improperly found no change of circumstances sufficient to justify terminating the contract for the Government's convenience. Although arguably the Government's circumstances had sufficiently changed to meet even the *Torncello* plurality standard, this court declines to reach this issue because

Torncello applies only when the Government enters a contract with no intention of fulfilling its promises. *Salsbury*, 905 F.2d at 1521.

LTC Johnson's decision to terminate is analogous to that made in *Caldwell*. LTC Johnson terminated the contract to preserve full and open competition. He decided to avoid any prospect of prejudice to other bidders. Unlike the *Torncello* situation, this record shows no evidence that the Corps intended from the outset to void its promises. Thus, *Torncello* does not apply. Accordingly, this court finds that LTC Johnson did not abuse his discretion, act arbitrarily or capriciously or in bad faith in terminating the contract for the Government's convenience.

This court reverses and remands for termination for convenience damages which are to include costs of performance prior to termination, profits on that performance and termination costs. No anticipatory profits are to be awarded. Reversed and remanded to calculate these costs.

COSTS

Each party shall bear its own costs.

REVERSED AND REMANDED

[available in Westlaw, 1993 WL 840295]

In the United States Court of Federal Claims

No. 214-89C

(Filed: Mar. 02, 1993)

KRYGOSKI CONSTRUCTION COMPANY, INC. **v.** **THE UNITED STATES**	Government contract; termination for convenience; military base demolition contract; asbestos abatement; change of circumstances; abuse of discretion; cardinal change.

H. Robert Showers, McLean, Virginia, for plaintiff. *Douglas R. Duberstein*, of counsel.

Harold A. Malkin, Washington, D.C., with whom was *Assistant Attorney General Stuart M. Gerson*, for defendant. *Arvis Friemuts*, United States Army Corps of Engineers, of counsel.

OPINION

YOCK, *Judge*:

This Government contract dispute arose out of a demolition contract between the United States Army Corps of Engineers, Detroit District (Corps or defendant) and Krygoski Construction Company, Inc. (Krygoski or plaintiff). The contract, among other things, required the

abatement and removal of asbestos at the former United States Air Force missile base located in the Hiawatha National Forest, some three and one-half miles southwest of Raco, in the upper peninsula of Michigan (the Raco site).

In this case, the Corps terminated the contract for the convenience of the Government before it permitted the plaintiff to perform under the terms of that contract. As a result, the plaintiff now seeks damages for breach of contract, equitable adjustments for performance costs and delay, costs, and attorney fees. After trial of the liability phase of this action, and upon consideration of the entire trial record, including oral and documentary evidence, as well as appropriate post-trial briefings and findings, this Court concludes that the plaintiff prevails in this action.

For the reasons stated herein, this Court finds that the Government breached its contract with the plaintiff when the contracting officer terminated the contract for the convenience of the Government under the facts here present.

Facts

The Department of Defense initially acquired possession of the Raco site for the United States Air Force to construct an airfield and missile site. Predominate on the 1,226 acre site are three airfield runways joined at the ends to form a triangle which are centrally located on the property. The missile site occupied an area several hundred feet to the southeast of this airfield triangle. At the time of the closure of the facility, the missile site, which was about thirty-five acres in size, contained twenty-eight partially-filled missile emplacements, a perimeter fence and road, two large maintenance buildings (the Composite and Assembly Buildings), two small sheds, and other miscellaneous structures. A complex of salvageable underground fuel tanks, located several hun-

dred feet southwest of the airfield triangle, serviced the airfield.

Upon the closing of the Raco site as an airfield and missile site, the Department of Defense transferred possession of the site to the United States Forest Service (Service). That Service requested that the Corps initiate the demolition of the Raco site in order to restore the area to its natural environment as a part of the Hiawatha National Forest. The Corps subsequently conducted several site surveys to ascertain qualification for demolition under the Environmental Restoration Defense Account. Finding applicability, the Corps also discovered the presence of asbestos-containing and asbestos-contaminated materials at the site. With these findings, the Corps then prepared contract specifications for the demolition of the facility, including the asbestos abatement, the razing of buildings, removal of underground fuel tanks, filling the empty missile silos, and other restorative work at the site.

Mr. Robert Warner, a civil engineer for the Corps and a recent graduate of the University of Michigan, was designated by the Corps as the project manager on the Raco project. It was his job to visit the site, determine the scope of the demolition project, including any environmental hazards, and prepare the necessary contractual documents (including estimated costs) for eventual bids. He initially visited the site in August of 1984, accompanied by an environmental scientist from the Corps (Mr. Zomparelli) and Mr. James Bray, a civil engineer with the Corps and chief of the Soo District Office in Sault Ste. Marie, Michigan (located nearby by Raco site). Prior to visiting the site, the team had obtained blueprints of the site (and directions from the Service) which, among other things, indicated that there were approximately 1,500 linear feet of asbestos insulated piping and 800 square feet of asbestos wall insulation to be dealt with within

the buildings. Although asbestos was one of the environmental hazards to be concerned with in the demolition contract, none of the three gentlemen on the team had any special expertise or qualifications in regard to asbestos discovery and abatement. While on the initial site visit (or the other two site visits before award), the team observed and confirmed the blueprint-noted asbestos pipe and wall insulation, but they did not discover or confirm any other asbestos-containing material. Although the floor tile was clearly visible, the team did not suspect that it would contain asbestos. They were well aware, however, of the extensive vandalism that had occurred within the buildings and the extensive amounts of building material debris scattered within the buildings that could be asbestos contaminated and would thus have to be abated and removed. In preparing the bid documents, Mr. Warner knew that all of the asbestos-containing and asbestos-contaminated materials at the site would have to be discovered, abated, and removed prior to general demolition at the site in order to conform with Corps directives and the environmental laws and regulations of the United States.

On August 12, 1985, the Corps issued an invitation for bids (IFB) for the demolition and removal of the structures and other physical emplacements at the Raco site.[1] Aside from the primary demolition of the Composite Building, with approximately 26,000 square feet of floor space, of the Assembly Building, with approximately 6,000 square feet, the filling of missile silos, and removal of the concrete pads, airplane slabs, and fuel tanks, the IFB estimated the abatement of some 2,300 linear feet

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[1] Contract DACA 35-85-B-0001.

and some 750 square feet of asbestos from the Raco site.[2] While asbestos abatement constituted a new concern and developing field during the early 1980's, the Corps held no prebid conference to allow bidders to ask questions about the specifications and site conditions. Nevertheless, plaintiff visited the site on its own five or six times to prepare its b*Id.*

Although the Corps had indicated in the solicitation that bids should range between $500,000 and $1,000,000,[3] the plaintiff submitted the overall low bid of $414,696 among seven other bidders.[4] On September 30, 1985, the Corps awarded Contract No. DACA35-85-B-0001 (the Corps contract) to plaintiff and, on October 15, 1985, issued a notice to proceed.

The primary issue in this case is whether the Government could terminate this case for its own convenience when it was discovered after award that there was more asbestos to be abated and removed from the missile site than was originally contemplated by the Corps, and consequently, the price to be paid by the Government for the demolition contract could be increased by upwards of some 75 percent.

Two of the items in the "Bidding Schedule" mentioned specific asbestos abatement requirements. Item 1 called for the removal and disposal of an estimated 1,600 linear feet of pipe insulation, and Item 2 called for the removal

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[2] Solicitation S-3.

[3] Solicitation S-1. The Corps had calculated the reasonable cost of performance at $953,865, which the Corps disclosed in the Bid Abstract after bid opening. Joint Stipulations, at 1.

[4] The Abstract of Offers shows the next lowest bid at $459,275 and the highest bid recorded at $904,350.

and disposal of an estimated 650 square feet of asbestos tank and duct insulation. The IFB required unit prices for the abatement of: (1) the first 1600 linear feet plus (2) additional linear footage of pipe insulation, and (3) the first 650 square feet plus (4) additional square footage of asbestos tank and duck insulation. Plaintiff bid $10.98/$10.75 per linear foot for asbestos abatement under Item 1 and $8.90/$8.78 per square foot for asbestos abatement under Item 2.[5]

At the time of the solicitation, neither party knew the exact amount and location of asbestos-containing and asbestos-contaminated materials at the site. In fact, as earlier discussed, the Corps had not conducted a comprehensive survey to identify the extent of asbestos contamination prior to issuance of the IFB. Instead, the Corps contract placed the burden upon the contractor after award to locate the forms of asbestos-containing and the scope of asbestos-contaminated materials at the Raco site, advise the Corps of the location and scope, and then proceed to abate and remove the asbestos from the site. Thus, the Corps issued an IFB for that part of the contract dealing with asbestos abatement at the Raco site with only cursory understanding of the scope of work required to perform the contract. It was, however, very clear to Mr. Warner that all of the asbestos found would have to be abated and removed prior to demolition.

Prior to contract award, the Corps also knew of the extensive vandalism at the Raco site. Although the contracting officer, Col. Phillip Johnson (hereafter CO), testified that he had not known the site had been vandalized, the project manager, Mr. Robert Warner, admitted

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[5] Contract/Solicitation S-3.

that he was well aware of the vandalism damage at the time the specifications for the contract were drafted. Asbestos insulation had been strewn about the Composite and Assembly buildings and partially covered the total square footage of these two large buildings (a total of some 32,000 square feet). Therefore, prior to award, the Corps minimally realized that the contaminated areas would require asbestos abatement procedures for the entire surface of the walls, beams, ceilings, and floors, yet the Corps failed to specify these expectations in the IFB. As a result of these shortcomings in the specifications, disputes over the forms of asbestos-containing materials and over compensation for abatement of asbestos-contained area precipitated the present contractual disagreement among the parties.

In final preparation prior to beginning the asbestos abatement work, the Corps' contract required that the plaintiff conduct a joint space-by-space, structure by structure inspection (thus, a predemolition survey) of the project site with the designated Corps representative.[6] The contract further required submission of a written inventory of all areas where asbestos had been located, which inventory was to be signed and certified by both parties to the contract. The predemolition survey and inventory constituted prerequisites to initiation of performance on the Corps contact.

In anticipation of the predemolition survey, Mr. Krygoski, the plaintiff's principal officer, visited the Raco site with his asbestos expert and subcontractor, Mr. Robert Ystueta, and with his lawyer and authorized representative, Mr. Randall Phillips, on October 24, 1985.

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[6] Contract 2A-12, ¶ 11.

During that visit, Mr. Ystueta noted the possible additional asbestos contamination in the floor tile and roof insulation. Neither the contract drawings nor the specifications showed the existence of asbestos in these areas. Immediately following their site visit, Mr. Phillips called Mr. James Bray, the contracting officer's representative on the Raco project,[7] to report plaintiff's findings and to request Mr. Bray's attendance at a predemolition survey. Located at Sault Ste. Marie, approximately forty miles from the Raco site, Mr. Bray had visited the Raco site on several occasions as a member of the Environmental Restoration Defense Account evaluation team in 1984 and on the site evaluation and contract drafting team in 1985.

After informing Mr. Bray of the extent of the vandalism and subsequent asbestos contamination, Mr. Phillips testified that Mr. Bray expressed full understanding that the entire 32,000 square feet of floor surface in the Composite and Assembly Buildings, as well as the walls, beams, and ceilings thereof, would require asbestos abatement. When Mr. Phillips also mentioned that approximately 3,000 to 4,000 square feet of vinyl floor tile would require abatement, as well as the roofing materials, Mr. Phillips testified that Mr. Bray expressed no surprised by the possible presence of the additional asbestos-containing materials, or that the Corps would have to pay for the abatement and removal of the additionally discovered asbestos-contaminated areas.

Mr. Phillips further testified that Mr. Bray instructed the plaintiff to indicate the extent of the asbestos con-

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[7] Unfortunately, Mr. Bray was killed in an airplane crash prior to this litigation, and not surprisingly, the parties dispute the substance of plaintiff's conversation with Mr. Bray.

tamination in writing and provide test results to confirm the presence of asbestos in the floor tile and roofing material. When questioned about compensation for the additional asbestos abatement, Mr. Phillips testified that Mr. Bray stated that the discovery of additional asbestos presented "no problem" and that he referred him to the "Variations in Estimated Quantities" and "Asbestos Removal and Disposal" clauses in the Corps contract.[8]

Following Mr. Bray's instructions, Mr. Phillips sent a formal notification of plaintiff's discovery of asbestos in the floor tile and roofing material to him by letter dated October 28, 1985. In the letter, Mr. Phillips proposed payment for the additional asbestos abatement at the contracted-for unit price; however, the letter provided neither an estimate of asbestos quantity nor a total price for the work involved.[9] In addition, Mr. Phillips again requested that the Corps schedule a predemolition joint survey as required under the contract.

On November, 4, 1985, the Corps, with Mr. Bray in charge, conducted a preconstruction conference with the

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[8] The Variations in Estimated Quantities clause provides, in part: "Variation from the estimated quantity and the actual work performed under any second or subsequent sub-item * * * will not be the basis for an adjustment in contract unit price." Contract ACC-12, ¶ 19(a). Thus, the unit price for a pay item remains the same regardless of the amount of additional work involved.

[9] Because the letter "proposed" complete asbestos abatement, defendant argues that the letter constituted a request for a modification to the contract. Defendant attempted to emphasize the importance of the word "proposal," but this Court finds plaintiff's arguments more persuasive. Since the contract called for complete asbestos abatement, and because the letter mentions only price and not quantity, this Court finds the plaintiff's letter to be merely notification and not a request for a modification of the contract.

plaintiff.[10] At the conference, as the preconstruction conference minutes record, Mr. Bray again confirmed the scope of the asbestos abatement at the Raco site. Although the defendant disputes the plaintiff's testimony in this regard, the minutes describing the conference clearly reference these issues. The minutes described: "The Contractor stated that there is more asbestos material than is shown on the drawings, and also that the floor tile and roof insulation contains asbestos material." In addition, with regard to compensation, the minutes explained how: "The Contractor was referred to Clause 19, page AAC-12, Variations in Estimated Quantities."

By letter dated April 29, 1986, the plaintiff submitted test results to the defendant which indicated the presence of asbestos in the floor tile and roofing material. By independent testing, the Corps confirmed asbestos in the floor tile and roof flashing in July of 1986. The Corps' testing showed no asbestos in the roofing material, but discovered a small amount of asbestos in a thin strip of insulation known as roof flashing, which covered the interface between the roof and the vents and walls of the building. The CO also testified at trial that the Corps usually required "split samples" for independent verification where the Corps' test results differ from those of the contractor. However, despite Mr. Krygoski's repeated requests, the Corps never agreed to meet Krygoski at the site to take split samples, nor did the Corps ever meet with Krygoski to discuss the differing test results.

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[10] Dissimilar to a predemolition "survey" where both parties conduct a joint inspection of the site, the parties held a "conference" where the parties only discussed the issues involving the Corps contract. The defendant never acceded to a joint predemolition survey.

During the time that the parties were independently resolving the questions over the extent of the asbestos-containing materials and contamination at the Raco site, the parties agreed to delay either a safety conference or equipment inspection. Even after resolution of the dispute involving the extent of the asbestos contamination, however, the defendant refused to conduct these contractual prerequisites to performance under the terms of the contract. Thus, although plaintiff performed work inspecting, testing, mobilizing, and preparing for demolition and asbestos abatement, the defendant prohibited performance of the Corps contract from May 1986 to September 1986.

The Corps suspended the Krygoski contract on August 21, 1986, and terminated the contract for convenience on September 5, 1986. At trial, the CO testified that the Corps based the termination solely on the larger estimated increase in amounts of asbestos materials and contamination to be abated (and the subsequent large cost increases) from that contemplated by the parties at the time they contracted. The CO testified that he believed the relatively large increase in the estimate of asbestos-containing and asbestos-contaminated materials and to be abated found after the contract was signed, amounted to a cardinal change to the contract, justifying a termination of the contract for the convenience of the Government. He used what he called a "rule of thumb" for cardinal changes. This "rule of thumb," for which the defendant cited no administrative authority or legal basis, required the automatic termination for convenience of any contract which required a net increase in cost of twenty-five to thirty percent, regardless of whether or not the increase was considered within the scope of the contract. Since the Corps considered the discovery of additional asbestos materials as outside the scope of the Corps contract, the CO's assertion of a cardinal change relied upon the Corps' excessive estimate of increase in

costs for the additional asbestos quantities (later, of course, determined to be much smaller).

After the plaintiff confirmed the presence of additional asbestos-containing and asbestos-contaminated materials at the Raco site in early 1986, the defendant initially estimated abatement requirements of 36,340 square feet of floor tile and 570 linear feet of roof flashing based strictly on the Raco site plans. Applying these estimates, the Corps inferred that the contract would cost an additional $320,000, for a total contract price of $734,000. As this cost increase surpassed the Corps' twenty-five to thirty percent "rule of thumb," the CO decided to terminate the contract for convenience. Ironically, following termination of the contract with the plaintiff, the Corps resolicited the contract with an estimated cost of $734,000. By this time, the Corps had further revised upward the asbestos abatement estimates to 49,000 square feet of floor tile and 2,800 linear feet of roof flashing. Yet, upon final analysis, only 9,000 square feet of floor tile and 200 linear feet of roof flashing required abatement.

This action followed.

Discussion

It is the plaintiff's position in this case that the Corps improperly terminated this contract for the convenience of the Government. Citing to the "change in circumstances" rule enunciated by the United States Court of Claims in *Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756 (1982), the plaintiff contends in its primary argument, that finding additional asbestos contamination at the site after award, with its concomitant increase in abatement and removal costs to the Government, does not amount to a change in circumstances under the facts of this case. The plaintiff asserts that the parties, at the time of award, contemplated and the contract so tates that all asbestos materials and asbestos contamination

known and unknown at the site had to be abated, removed, and paid for as specified in the contract. Thus, finding additional asbestos contamination at the demolition site after award was not a "change in circumstances" as would justify a termination for convenience, and in fact, it was within the scope of the contract and the contemplation of the parties at the time of award.

In the alternative, the plaintiff argues that the Corps abused its discretion in terminating this contract citing to the bad faith/abuse of discretion termination for convenience standard enunciated in *Kalvar Corp. v. United States*, 211 Ct. Cl. 192, 198 n.1, 543 F.2d 1298, 1301 n.1 (1976), *cert. denied*, 434 U.S. 830 (1977). In this connection, the plaintiff cites to the Corps' inadequate initial site investigation, its contract administration negligence after award in making overblown estimates of the amount of the discovered asbestos to be abated and removed, and in refusing to work with the plaintiff as the contract directed.

The defendant's position is simply to the contrary. The defendant asserts that there was no bad faith/abuse of discretion (as discussed in *Kalvar*) involved in the CO's termination of this contract, or in the alternative (assuming the Court found the *Torncello* legal standard to be the applicable standard), the discovery of more asbestos-containing and asbestos-contaminated materials at the site after award was a substantial change in circumstances justifying the termination of the contract for the Government's convenience.

A. Legal Standard

The contract at issue in this case provided for convenience termination through a mandatory standard termination for convenience clause as required by the Federal Acquisitions Regulation (FAR). The clause in the contract states:

> The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.[11]

Despite the broad language of this clause, however, the Government's right to terminate for convenience is not an unfettered and absolute right. *Torncello*, 231 Ct. Cl. at 37, 681 F.2d at 766. There are some very real limitations placed on the Government's right to terminate for its own convenience by the applicable case law. Just what those "limitations" or "legal standards" are, however, are disputed in this case by the parties. It therefore behooves this Court to determine, prior to an analysis of the facts, just what legal standard is to be applied in this termination for convenience case.

As already previewed, it is the plaintiff's position that the appropriate legal standard to apply in termination for convenience cases is the "change in circumstances" rule as enunciated by an *en banc* ruling of the United States Court of Claims in its 1982 *Torncello* case. The Government, however, is equally adamant in its argument and views the *Torncello* case as "dated and dicta laden." It asserts that the appropriate legal standard is the "bad faith/abuse of discretion" standard perhaps most clearly articulated in the Court of Claims' 1977 *Kalvar* case, and recently reenunciated in *Salsbury Indus. v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1980), *cert. denied*, 111 S. Ct. 671 (1991).

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[11] Contract CC-60, ¶ 62(a); *see* FAR 52.249-2.

As early as 1863, the Government asserted the right to terminate a contract without cause and limit the contractor's recovery. JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 818-19 (2d ed.1986) (hereinafter CIBINIC & NASH, ADMINISTRATION). The right initially served the Government's interest in winding down military procurement following the Civil War. Stephen N. Young, Note, *Limited the Government's Ability to Terminate for its Convenience following Tornecello*, 52 GEO. WASH. L. REV. 892, 894 (1984).

In 1876, the Supreme Court first articulated the legal theory for this extraordinary governmental right:

> Contracts for the armament and equipment of vessels of war may, and generally do, require numerous modifications in the progress of the work, where that work requires years for its completion. With the improvements constantly made in shipbuilding and steam-machinery and in arms, some parts originally contracted for may have to be abandoned, and other parts substituted; and it would be of serious detriment to the public service if the power of the head of the [agency or department] did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors.

United States v. Corliss Steam-Engine Co., 91 U.S. 321, 323 (1876). During World War I, under the Urgent Deficiency Appropriation Act of 1917, and during World War II, under the Contract Settlement Act of 1944, Congress further refined the scope and application of convenience termination. 2 RALPH C. NASH, JR. & JOHN CIBINIC, JR., FEDERAL PROCUREMENT LAW 1104-07 (3d ed. 1980). Since 1967, the Federal Procurement Regulations, and subsequently the FAR, have mandated the inclusion of the termination for convenience clause in

almost all Government contracts. CIBINIC & NASH, ADMINISTRATION, at 818-19.

Throughout the statutory and regulatory evolution of this contract right, the bad faith/abuse of discretion legal standard had comprised the only judicially recognized limitation the Government's right to convenience termination.[12] John Cibinic, Jr., *Termination for Convenience: Searching for the Changed Circumstances Rule*, 4 NASH & CIBINIC REP. ¶ 55, at 133 (1990) (hereinafter Cibinic, *Termination for Convenience*). However, in 1982, in the seminal case of *Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756 (1982), the United States Court of Claims went through an exhausting historical analysis and review of the legal theory supporting the Government's right to terminate a contract for its own convenience. Writing for the plurality (three of six judges, with three judges concurring separately) in an *en banc* decision, Judge Bennett explained:

> The response in this court [to the *Corliss* doctrine] was to rely on the risk allocation nature of the concept and to allow termination for convenience only when the expectations of the parties had been subjected to a substantial change. The contractor risked losing the full benefit of his performance if something occurred, apart from the bargain and the expectations

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[12] Prior to *Torncello*, the United States Court of Claims established no clear distinction between bad faith, abuse of discretion, and gross error. *See Kalvar Corp. v. United States*, 211 Ct. Cl. at 198 n.1, 543 F.2d at 1301 n.1 ("We need not decide whether bad faith is tantamount to abuse of discretion, since in our view plaintiff's claims indicate neither was present here. However, many of our prior decisions seem implicitly to accept the equivalence of bad faith, abuse of discretion, and gross error.").

> of the parties, that made continuance of this contract clearly inadvisable. * * *
>
> The [history of] cases recognized that the termination for convenience clause was only to be applied where there was some change from the parties' original bargain and was not to be applied as broadly as an untutored reading of the words might suggest.

Torncello, 231 Ct. Cl. at 36-37, 681 F.2d at 766 (emphasis added). Thus, in reviewing and resolving the jurisprudence surrounding the right, Judge Bennett acknowledged a more precise limitation on the Government's right to terminate a contract for its own convenience and implicitly rejected the old bad faith/abuse of discretion standard as no real limitation at all. Judge Bennett concluded:

> Therefore, we must read the termination for convenience clause * * * to require some kind of change from the circumstances of the bargain or in the expectations of the parties. These are just the historical limits on the use of the clause as they have developed from *Corliss*.

Id. at 48, 681 F.2d at 772. Thus, the *Torncello* "change in circumstances" rule was born.

Throughout its ten year history, the *Torncello* rule has been repeatedly applied and affirmed by the federal courts.[13] *See, e.g., EDO Corp. v. Beech Aircraft Corp.*, 911

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[13] The various boards of contract appeals have not followed the *Torncello* holding as uniformly. *See Vect-Tor, Inc.*, ASBCA Nos. 25,807, 26,128, 85-1 BCA ¶ 17,755, at 88,677 ("We agree with the concurring opinions and will follow the bad faith/abuse of discretion rule regarding convenience-termination until the 'change of circumstances' rule is adopted by a clear majority of the Court."); *see also Automated*

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F.2d 1447, 1452-53 (10th Cir. 1990) (applying the *Torncello* analysis); *Maxima Corp. v. United States*, 847 F.2d 1549, 1553 (Fed. Cir. 1988) (affirming the rationale of *Torncello*); *Pacificorp Capital, Inc. v. United States*, 25 Cl. Ct. 707, 719-20 (1992) (applying *Torncello*'s change in circumstance rule); *Government Sys. Advisors, Inc. v. United States*, 21 Cl. Ct. 400, 408-10 (1990) (invoking *Torncello* and its progeny), *vacated on other grounds*, 25 Cl. Ct. 554 (1990); *SMS Data Prods. Group, Inc. v. United States*, 19 Cl. Ct. 612, 619-21 (1990) (finding a proper termination for convenience under *Torncello*'s change in circumstances rule); *Erwin v. United States*, 19 Cl. Ct. 47, 53-54 (1989) (requiring analysis pursuant to *Torncello*'s change of circumstances rule); *Nationwide Roofing and Sheet Metal Co. v. United States*, 14 Cl. Ct. 733, 735-36 (1988) (finding a proper termination pursuant to the change in circumstances rule); *Municipal Leasing Corp. v. United States*, 7 Cl. Ct. 43, 47 (1984) (concluding that the Government improperly terminated a contract for convenience because there was no change in circumstances).

As recently as 1988, the United States Court of Appeals for the Federal Circuit (hereinafter Federal Circuit) specifically approved *Torncello*'s change of cir-

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(Footnote cont'd from previous page.)

Services, Inc., DOTBCA No. 1753, 87-1 BCA ¶ 19,459, at 98,352-55; *see also Drain-A-Way Sys.*, GSBCA No. 7022, 84-1 BCA ¶ 16,929, at 84,215-16; *but cf. Tamp Corp.*, ASBCA No. 25,692,84-2 BCA ¶ 17,460 at 86, 977-78; *S&W Tire Servs., Inc.*, GSBCA No. 6,376,82-2 BCA ¶ 16,048, at 79,619-21. For a discussion of the dichotomy between the courts' and boards', application of *Torncello*, see generally John Cibinic, Jr., *Termination for Convenience of the Government: Another Chink in the Boilerplate*, 2 NASH & CIBINIC REP. ¶ 43, at 108-110 (1988).

cumstance rule and its progeny. In *Maxima Corp. v. United States*, 847 F.2d at 1549, the court outlined the jurisprudential development of the *Torncello* rule:

> The extensive jurisprudence generated by this concept illustrates its fairly uniform modern application. The courts have held that a governmental breach of contract may be construed as a termination for the convenience of the government when changed circumstances justify the reallocation of risk to the contractor.

Id. at 1552. As the court concluded: "The jurisprudence makes clear that termination for convenience, whether actual or constructive, is not of unlimited actual or constructive, is not of unlimited availability to the government, that it is not an open license to dishonor contractual obligations." *Id.* at 1553. Also, in *Maxima*, the court approvingly quoted Judge Merow of the Claims Court, who stated: "The termination for convenience clause can appropriately be invoked only in the event of some kind of change from the circumstances of the bargain or in the expectations of the parties * * *." *Id.* (quoting Municipal Leasing, 7 Cl. Ct. at 47 (emphasis added)).

The Government, however, in maintaining its current position that the bad faith/abuse of discretion standard is still the correct legal standard, conveniently overlook this series of cases that apply the *Torncello* rule. Instead, it focuses almost exclusively on the *Salsbury* case, decided in 1990, which it believes reestablishes the bad faith/abuse of discretion standard as the exclusive standard to apply in these termination for convenience cases.

Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 671 (1991).[14]

Although this matter is not entirely free from doubt, this Court does not agree with the Government's position for several reasons.[15] First and perhaps foremost is the fact that the *Salsbury* case does not focus on the legal standards to be applied in all termination for convenience cases. Whereas it does utilize the bad faith/abuse of discretion legal standard to arrive at its holding in that case, it nowhere announces that the *Torncello* rule is overruled. In discussing *Torncello*, it distinguishes the factual background in that case from the factual background in the matter before it in *Salsbury*, and announces that "*Torncello* has nothing to do with this case." *Salsbury*, 905 F.2d at 1521. Thus, the Court views the *Salsbury* case as saying that one has to look to the factual circumstances of each case to determine the appropriate legal standard to apply. This being the case, it is clear that the *Torncello* legal standard is still very much alive and available for application in the appropriate case. Second, although the *Salsbury* case does mention *Torncello*, it ignores the many cases since 1982 that have relied on its announced "change in circumstances" rule,

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[14] *See also A-Transport Northwest Co. v. United States*, 27 Fed. Cl. 206, 220 (1992); *Modern Sys. Technology Corp. v. United States*, 24 Cl. Ct. 699, 704 n.5, *aff'd*, 980 F.2d 745 (Fed.Cir.1992).

[15] Since the matter is not entirely free from doubt, and in fact there has been considerable confusion about the correct legal standard (witness the various boards' decisions to the contrary, legal commentaries in various legal journals and publications cited herein, the *Salsbury* case, and the several United States Claims Court cases that comment on it), it may prove beneficial for the Federal Circuit to revisit this area of jurisprudence at some future date to clarify its present position in this regard.

especially the *Maxima* case which as decided by a panel decision of the Federal Circuit in 1988, just two years before the *Salsbury* decision. Finally, even assuming, *arguendo*, that the Federal Circuit sought to overrule *Torncello* in *Salsbury*, this Court notes that the Federal Circuit has historically not overruled the precedent of its predecessor court (especially of a full panel, albeit a plurality as in *Torncello*) except by an *en banc* decision. In *South Corp. v. United States*, 690 F.2d 1368 (Fed. Cir. 1982), in an *en banc* decision of the first appeal heard and first decision published by the new court of appeals, the Federal Circuit established the precedential case law for the court:

> The present adoption [of the precedents of the Court of Claims and Court of Customs and Patent Appeals] does not affect the power of this court, *sitting in banc*, to overrule an earlier holding with appropriate explication of the factors compelling removal of that holding as precedent. If conflict appears among precedents, in any field of law, it may be resolved by the court *in banc* in an appropriate case.

Id. at 1370 n. 2 (emphasis added). Under the *South Corp.* rule, therefore, the split panel in *Salsbury* could not overturn *Torncello*, even had it aspired to do so: only an *en banc* decision of the Federal Circuit overrules a precedent of the Court of Claims.[16] Thus, despite any interpretation of *Salsbury*, the change of circumstances rule of *Torncello* survives.

For all of the above reasons then, this Court concludes that the law of termination for convenience re-

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[16] This logic would be equally applicable to the argument that the *Salsbury* decision also overruled *Maxima*.

mains that absent some showing of substantial change in circumstances which justify allocating the risk of non-performance to the contractor, the Government's right to terminate for convenience "whether actual or constructive, is not of unlimited availability to the government, that it is not an open license to dishonor contractual obligations." *Maxima*, 847 F.2d at 1553.

B. Contract Termination

Having decided that the *Torncello* rule remains the applicable standard in this case, it should quickly be pointed out that both parties, following the abundance of caution rule, have presented their case factually so that either standard could be applied by this Court. And, since this matter is not free from doubt, the Court has analyzed this case with both standards in mind. As earlier indicated, regardless of which standard is adopted, the plaintiff prevails in the liability phase of this action.

1. Change in Circumstances

In the instant case, the defendant asserts a proper termination for convenience pursuant to its estimates of huge cost increases for the complete asbestos abatement job at the Raco site. Thus, defendant claims that the alleged large cost increases constitute a sufficient change in circumstances to justify convenience termination under *Torncello*. In contrast, the plaintiff here contends that the abatement of all of the asbestos from the Raco site fell within the terms of the contract, and therefore, that no change in circumstance occurred. The plaintiff claimed that the contract from day one contemplated that all the asbestos found at the Raco site was to be abated. In support of this position, the plaintiff points to four clauses in the contract that it believes establishes that all asbestos at the Raco site was to be abated.

First, the "Description of Work" clause in the contract at issue specifically sustains an interpretation requiring complete abatement of asbestos-containing materials at the site. The clause provides:

> The work specified herein shall be the removal of asbestos-containing materials from walls, pipes, ducts, equipment, *and other locations* by persons knowledgeable, qualified, and trained in the removal, treatment and disposal of asbestos-containing material, and the subsequent cleaning of the affected environment, and who comply with the Federal and State regulations which mandate work practices, and who are capable of performing this contract.[17]

On its face, this clause clearly contemplates the abatement of all "asbestos- containing" materials from all locations at the Raco site. Thus, although plaintiff discovered that the floor tile and roof flashing contained asbestos after award, this clause demonstrates that defendant envisioned the presence of asbestos-containing materials in "other locations" at the site and contemplated the removal of this material.

Second, under the same clause, the Corps contract placed the burden upon the contractor to discover and abate any other forms of "asbestos-contaminated" materials at the Raco site. The Description of Work clause continued and specified:

> The Contractor shall consult the supplied drawings and other job descriptions as a guide and shall visit the site to assess the exact amounts of asbestos present as well as the degree of physical difficulty in-

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[17] Contract 2A-1, ¶ 3 (emphasis added).

> volved in its complete removal. *All debris inside buildings containing asbestos shall be considered as asbestos-contaminated and shall be treated accordingly.*[18]

In the section, "Contract Drawings, Maps and Specifications," the Corps contract further specifies the scope of the contractor's obligations under the Description of Work clause:

> Omissions from the drawings or specifications or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, *shall not relieve the Contractor from performing such omitted or misdescribed details of the work, but they shall be performed as if fully and correctly set forth and described in the drawings and specifications.*[19]

This clause likewise indicates that the defendant placed primary responsibility upon the plaintiff to find and abate all forms of "asbestos- contaminated" debris at the Raco site. At trial, witnesses for both parties confirmed that the scope of the contract required the abatement and complete removal of all "asbestos-containing" as well as "asbestos-contaminated" materials present at the site, regardless of whether identified with the specifications. Colonel Johnson, the CO, as well as the Corps official who drafted the specifications, Mr. Robert Warner, testified that the Corps contract contemplated that the contractor would perform complete asbestos abatement the Raco site.

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[18] *Id.* (emphasis added).

[19] Contract ACC-8, ¶ 12(b) (emphasis added).

Third, as recited in the "General," or introductory, clause to the contract section on "Asbestos Removal and Disposal," the Corps contract mandates compliance with federal and state safety and health regulations. The clause provides:

> It has been determined that friable asbestos materials exist within materials and equipment scheduled to be removed in this project. It shall be the responsibility of the Contractor to perform asbestos removal operations in accordance with the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) Asbestos Regulations, Code of Federal Regulations Title 29, Part 1910, and Environmental Protection Agency (EPA) Regulations for Asbestos, Code of Federal Regulations Title 40, Part 61, Subpart A and B. In the event of conflict between the requirements of these regulations and the requirements stated herein, the more stringent requirement shall govern.[20]

The National Emission Standard for Hazardous Air Pollutants (NESHAP) mandate complete abatement of all "friable"[21] asbestos prior to the demolition of any facility.[22] As the contract specifies, "[i]n the event of conflict between the requirements of these regulations and the requirements stated herein, the more stringent require-

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[20] Contract 2A-1, ¶ 1.

[21] Friability refers to "any material containing more than 1 percent asbestos" and "when dry, can be crumbled, pulverized, or reduced to powder by hand pressure." 40 C.F.R. § 61.141 (1992).

[22] *See generally* 40 C.F.R. § 61.145 (1992) (describing the application of National Emission Standard for Asbestos during demolition and renovation).

ment shall govern," it is clear that the NESHAP standard applies; therefore, the Corps contract implicitly incorporated a requirement for full asbestos abatement at the Raco site. In addition, witnesses for both parties admitted at trial that EPA and OSHA regulations require the complete removal of asbestos from a structure before demolition. Plaintiff's very credible and persuasive expert, Dr. Anton Lott, clarified the application of the NESHAP standards and confirmed that the General clause of the Corps contract required compliance with, and deference to, EPA standards on asbestos abatement. Furthermore, even the CO admitted that the EPA and OSHA regulations require the removal of all asbestos materials within a building prior to demolition.

Fourth, the mandatory predemolition survey, as required under the "Final Preparations Prior to Commencement of Asbestos Abatement" clause, contemplates the discovery of additional asbestos at the Raco site. The contract specified that the contractor shall:

> Conduct a space-by-space structure by structure inspection with the designated representative of the Government and prepare a written inventory of all existing areas whereas asbestos has been identified. This document will be signed and certified as to accuracy by both parties. All pipe, tank, and duct insulation shall be considered to be asbestos, and shall be treated as such, unless the Contractor provides visual and/or analytical evidence satisfactory to the Contracting Officer that specific portions of the insulation are not asbestos.[23]

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[23] Contract 2A-12, ¶ 11(1).

Defendant seeks to limit the reading of the clause expressly to the "pipe, tank, and duct insulation" as specified in the contract. This narrow reading, however, stands in direct contrast to the provision's mandate that the contractor inventory "all existing areas where asbestos has been identified." Indeed, were all asbestos identified under the initial terms of the Corps contract, the "space-by-space, structure by structure" inspection mandate of this clause would seem superfluous and unnecessary.

Aside from the defendant's denials of the preceding four reasons why the Corps contract contemplated complete asbestos abatement,[24] the defendant also proposed the following three rationales as grounds why the Corps contract did not contemplate complete asbestos abatement at the Raco site.

First, the defendant argues that the terms of the Bidding Schedule limit the scope of asbestos abatement solely to those materials specified therein. The schedule lists two items related to asbestos:

1. Asbestos Pipe Insulation
   Removal and Disposal
   a. First 1600 Linear feet — 1600 L.F.
   b. Over 1600 Linear feet — 700 L.F.

2. Asbestos Tank and Duct Insulation
   Removal and Disposal

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[24] This Court notes, with interest, that while defendant strenuously argues that the Corps contract had not contemplated the complete abatement of all asbestos at the Raco site, *all* of defendant's witnesses testified to the contrary. Transcript (Johnson), at 526, 529-30; Transcript (Warner), at 689; Transcript (Rossow), at 774.

a. First 650 Square feet 650 S.F.
b. Over 650 Square feet 100 S.F.[25]

The Bidding Schedule's estimation of 2,300 linear feet and 750 square feet of asbestos insulation, however, included the contractual limitations, as set forth in a footnote, that "[a]ll quantities are estimated * * *."[26] In the same series of footnotes, the Corps contract also refers the contractor to the "Variations in Estimated Quantities Clause" which provides:

> This Clause is applicable only to Item No. 1, "Asbestos Insulated Pipe Removal and Disposal", Item No. 2, "Asbestos Insulated Duct Removal and Disposal", * * *.
>
> a. Variation from the estimated quantity in the actual work performed under any second or subsequent sub-item * * * will not be the basis for an adjustment in contract unit price.
>
> * * * *
>
> c. If the quantity of work performed under an item exceeds 105% or is less than 96% of the total estimated quantity of the sub-items under that item, * * * and if such variation causes an increase or a decrease in the time required for performance of this contract the contract completion time will be adjusted * * *.[27]

Significantly, this clause places no limitation on the potential variance from contract estimates. Thus, contrary

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[25] Contract S-3.

[26] Solicitation S-3 n.2.

[27] Contract ACC-12, ¶ 19, 19(a), 19(c).

to defendant's assertions, these clauses suggest the incorporation (not exclusion) of asbestos quantities not specified in the contract.

Second, the defendant argues that the terms of the "Payment" clause limit the scope of compensation for asbestos abatement to those materials specifically enumerated under the clause. The parties, thus, dispute the meaning of the clause, which provides:

> All acceptably completed work required under this Section of the specifications for Asbestos Removal and Disposal will be paid for at the applicable contract unit price per linear foot or per square foot for the payment items "Asbestos Pipe Insulation Removal and Disposal" and "Asbestos Tank and Duct Insulation Removal and Disposal."[28]

Because the Bidding Schedule lists only two items related to asbestos, the defendant suggests that the contract provides for payment only for "Asbestos Pipe Insulation Removal and Disposal" and "Asbestos Tank and Duct Insulation Removal and Disposal." In contrast, the plaintiff argues that the phrase, "work required under this Section," refers to the Description of Work clause, as quoted above, and thus extends to the "removal of asbestos-containing materials from walls, pipes, ducts, equipment, and other locations * * *."[29] Thus, plaintiff argues that the contract contemplated payment not only for the pipe, tank, and duct insulation at the requisite unit price but also for debris removal and asbestos

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[28] Contract 2A-27, ¶ 21.

[29] Contract 2A-1, ¶ 3.

abatement from all "other locations."[30] As even the CO illustrated at trial,[31] the defendant's argument is non-

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[30] *Id.* Thus, for asbestos abatement at $10.75 per linear foot after the first 1,600 linear feet and for asbestos abatement at $8.78 per square feet after the first 650 square feet, which conforms to plaintiff's bid for the removal and disposal of pipe insulation and of tank and duct insulation, respectively. Contract S-3.

[31] After this Court referred the CO to the Payment clause, the following exchange took place among plaintiff's counsel and the witness:

Q It defines—is that the payment provision for the asbestos removal work?

A For the pipe insulation and the tank and duct insulation removal, that's correct.

Q That's your opinion?

A Yes, it is.

* * * *

Q Okay. And it doesn't say that all acceptably completed removal of pipe, tank, and duct insulation will be paid under the unit price, does it? It says all acceptably completed work under this section.

A You are correct.

Q And when you are talking about all acceptably completed work, that's referring back, I would assume, to the scope of the work or the description of the work because that's what's required under 2A. Would that be a fair assessment?

A That's Correct.

Q Okay. So you are going to pay all acceptably completed work within the scope of that contract by the unit price under Paragraph 21, either square foot or linear foot. Is that what 21 says?

A Yes.

Q And it is your interpretation, if I understand you, that it's only limited to pipe, tank, and duct insulation?

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sensical. Thus, this Court rejects defendant's contention that while the Corps expected additional asbestos at the Raco site, the Corps anticipated payment only for the abatement of additional pipe, tank and duct insulation that contained asbestos.

Third, and finally, the defendant argues that the presence of the additional asbestos-containing material, specifically the floor tile and roof flashing, constituted a differing site condition under the "Differing Site Conditions" clause. The clause specifies:

> The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which *differ materially* from those indicated in this contract, or (2) unknown physical conditions at the site of an unusual nature, which *differ materially* from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.[32]

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A That would be my interpretation.

Q Even though the scope is much broader and you know that there is debris as well as other locations that would be contaminated or contained materials?

A Yes.

Transcript (Johnson), at 531-32.

[32] Contract CC-40, ¶ 43(a) (emphasis added). In further support of its argument, Mr. Rossow pointed out that Mr. Phillips referred to the differing site conditions clause in his October 28, 1985 letter to the contracting officer's representative. However, Mr. Phillips testified that he referred to the clause because it was the only section of the

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The contract administrator on the Raco project, Mr. Rossow, testified that the discovery of asbestos in the floor tile constituted a "differing site condition." He testified that, because asbestos floor tile was not included in the plans or specifications for the project, its abatement could not be included in the Variations in Estimated Quantities clause. As a result, Mr. Rossow opined that, in order to seek compensation for the additional asbestos abatement work, the plaintiff should have sought an equitable adjustment under the differing site conditions provision of the contract. As the contract contemplated all asbestos abatement under estimated quantities, this Court disagrees. When the plaintiff discovered the scope of the asbestos contamination, the plaintiff contacted the Contracting Officer's representative, Mr. Bray, who referred plaintiff to the Variations in Estimated Quantities clause. In addition, at the November 4, 1985 predemolition conference, Mr. Bray again referred plaintiff to the clause on the issue. As the asbestos provisions of the Corps contract constituted unit-price items based on estimated quantities, this Court finds that Mr. Bray referenced the correct contract clause. In addition to this Court's reading of the contract, the Corps' own witnesses admitted that, prior to award, they suspected widespread asbestos contamination and the presence of additional asbestos- containing materials in "other locations" than pipe, tank, and duct insulation. In view of these expectations, this Court finds it difficult to conclude that

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contract which provided for notification to the Corps. Even though the plaintiff referenced the wrong clause, the plaintiff nevertheless fulfilled its obligation to provide notice of its findings to the defendant.

the additional asbestos discovered "materially differed" from the terms of the Corps contract.

As evidenced by the three arguments presented above, the defendant suggests an illogical approach to contract interpretation. The defendant proposes that this Court read the Corps contract with blinders. However, a court is not supposed to read any single clause of a contract without considering the context. *See United Pac. Ins. Co. v. United States*, 204 Ct. Cl. 686, 691-92, 497 F.2d 1402, 1405 (1974) ("It is an elementary rule of contract interpretation that all parts of a contract must be read together and harmonized if at all possible.") As Professors Cibinic and Nash recognize, the "basic rule of contract interpretation" requires:

> When a contract is set forth in writing, it is the entire writing which embodies the agreement of the parties, not individual sections or clauses. Since language derives its meaning largely from the context in which it appears, an attempt to interpret a word, term or clause independent of the remainder of the contract document may distort its meaning and thus not accurately reflect the intent of the parties.

CIBINIC & NASH, ADMINISTRATION, at 110; *see also* 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 555, at 236 (1960) ("The final interpretation of a word or phrase should not be adjudged without giving consideration to all relevant word usages, to the entire context and the whole contract, and to all relevant surrounding circumstances."). Thus, defendant's attempts to construe single clauses, independently from the entirety of the contract, contrasts with this Court's understanding of basic contract law.

Therefore, based on the change of circumstances rule of *Torncello*, and in view of the preceding arguments, this Court finds that the defendant shows no requisite change of circumstances on which to justify a termination for

convenience. In *Torncello*, a contractor submitted the lowest bid upon and won a multiple-item requirements contract but, after award, the Government refused to issue calls for work under an item for which the contractor had bid a much higher price. *Torncello*, 231 Ct. Cl. at 21-23, 681 F.2d at 757-58. Finding a constructive termination for convenience by the Government's failure to issue calls for the more expensive items, the Court of Claims granted the plaintiff breach of contract damages. *Id.* at 48-49, 681 F.2d at 772. Likewise, in the case at bar, the plaintiff submitted the lowest bid upon and won a multiple-item estimated quantities contract but, after award, the defendant refused to abide by the contract pursuant to an item for which the contractor had bid a higher price. Based solely upon an arbitrary expectation of an increase in cost for this item, the Corps terminated the present contract for convenience. In light of the similarity between *Torncello* and the instant case, this Court agrees that the defendant then improperly terminated this contract for convenience.

However, the defendant contends that the termination of the Corps contract constituted a "classic" use of the convenience termination doctrine as the Government sought merely to obtain a better price. By propounding this interesting argument, the defendant confirms the witticism recited by plaintiff's counsel at trial regarding the convenience termination of the Corps contract:

> "Dear Mr. Krygoski: Your contract with the government is hereby terminated because you found 49,000 square feet of additional asbestos material outside the scope of our contract, I think. In any event, you made an unsolicited change order request for $324,000 for additional asbestos in the floor tile and flashing, probably. Well, even if neither conclusion is true, said contract is still terminated because it suits me to do

> so, and I have found a way to get a better price, thanks to you."[33]

Indeed, this Court finds no such "classic" use of the termination for convenience clause. Here, as throughout its arguments, the defendant completely ignores the findings of *Torncello* where the Court of Claims explicitly overruled *Colonial Metals Co. v. United States*, 204 Ct. Cl. 320, 494 F.2d 1355 (1974), *overruled by Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756 (1982).

In *Colonial Metals*, the Court of Claims affirmed "the Government['s] terminat[ion] to get a better price from another source, a price which the Government throughout knew or ought to have known was readily available" and recognized: "Termination to buy elsewhere at a cheaper price is essentially such a termination as has repeatedly been approved." *Id.* at 329-30, 331, 494 F.2d at 1360, 1361. Thus, if the defendant's "classic" use ever existed in the Court of Claims jurisprudence, *Torncello* abolished the short-lived rule: "*Colonial Metals Co. v. United States*, to the extent that it is inconsistent with this opinion, is overruled. We cannot condone termination based on knowledge of a lower cost when that knowledge preceded award of the contract." *Torncello*, 231 Ct. Cl. at 49, 681 F.2d at 772 (citation omitted).

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[33] Transcript (Plaintiff's Opening Statement), at 5. Counsel for the plaintiff paraphrased Judge Bennett's hypothetical telegram in Torncello: " 'Your contract with me * * * is hereby terminated because you are in default, I think; in any event, you are tardy in making progress, probably. Even if neither conclusion is true, said contract is still terminated because it suits me do so.' " Torncello, 231 Ct. Cl. at 40, 681 F.2d at 767 (quoting Newman, *The Beginning of the End—The Encroachment of Federal Contract Termination Practices*, 33 BUS. LAW. 2143, 2143 (1978)).

Nevertheless, in further support of its alleged "classic" use of convenience termination, the defendant cites *Nolan Bros., Inc. v. United States*, 186 Ct. Cl. 602, 405 F.2d 1250 (1969). Although the termination for convenience in *Nolan* depended not on price but on inadequate design and defective specifications, the defendant emphasizes how the Court of Claims held in *Nolan* that the Government may terminate a contract for convenience if the Government discovers, after the contract award, that "the job is impossible or too difficult to perform or too costly for the Government if pushed through to its conclusion." *Id.* at 606, 405 F.2d at 1253. While this Court agrees that the Government should not be forced to "see the contract work through to the bitter end, no matter what the cost," the defendant has presented no evidence that the supposed price increase made the Corps contract impossible or too difficult to perform.[34] *Id.* In addition, *Nolan* precedes the Court of Claims' *en banc* consideration of convenience termination in *Torncello*, where the court cited *Nolan* as a case involving a change of circumstance. *Torncello*, 231 Ct. Cl. at 37, 681 F.2d at 766. In the instant case, in contrast, the defendant shows no change of circumstance and thus no justification for the termination for convenience.

Just as in *Torncello*, therefore, the defendant in this case seeks to abrogate its contractual obligations after award of the contract based upon a price known to and circumstances contemplated by the Government at the time of award. Similarly, just as in *Torncello*, this Court

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[34] Under the *Nolan* standard, the defendant shows no evidence that the prices contemplated for the asbestos abatement were unreasonable. In fact, the Corps' own witnesses undermine this line of argument.

finds that the Government wrongfully terminated the contract for convenience, and thus breached the contract. For the foregoing reasons, this Court concludes that the defendant has failed to meet the *Torncello* change of circumstances rule.

2. Bad Faith/Abuse of Discretion

Even were this Court to accept the defendant's arguments rejecting the *Torncello* rule in this termination for convenience case, this Court finds that the plaintiff nevertheless prevails based on the blatant abuse of discretion exhibited by the Corps in the administration of this contract.

As cited above, prior to *Torncello*, the *Kalvar* standard comprised the only limitation upon the Government's right of termination for convenience. Under *Kalvar*, the plaintiff maintained the burden of proving bad faith/abuse of discretion by the Government to overturn a convenience termination. *Kalvar Corp. v. United States*, 211 Ct. Cl. 192, 199, 543 F.2d 1298, 1302 (1976), *cert. denied*, 434 U.S. 830 (1977). By stipulation in this case, the parties admit the lack of bad faith on the part of the defendant, yet this Court finds the stipulation somewhat premature in view of the uncertainty surrounding the meaning and forms of bad faith.

The indefinite understanding of bad faith results from the dual nature of the standard, one encompassing contractual bad faith and the other tortious bad faith. *See* John Cibinic, Jr., *Bad Faith: The Dark Side*, 4 NASH & CIBINIC REP. ¶ 46, at 107 (hereinafter Cibinic, *Bad Faith*). In the context of contract law, bad faith constitutes a breach of duty of good faith and fair dealing. *Id.* The RESTATEMENT, SECOND, OF CONTRACTS § 205, comment d, at 100- 01 (1981), describes:

> A complete catalogue of types of bad faith is impossible, but the following types are among those which

> have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance.

On the other hand, tortious bad faith implicates the tort concepts of malice and negligence. Eric G. Anderson, Article, *Good Faith in the Enforcement of Contracts*, 73 IOWA L. REV. 299, 324 (1988). This Court, of course, maintains no jurisdiction over claims sounding in tort but, as Professor Cibinic points out, courts have traditionally not clearly defined the distinctions in contractual and tortious bad faith. Cibinic, *Bad Faith*, at 108; *see also Kalvar*, 211 Ct. Cl. at 198 n.1, 543 F.2d at 1301 n.1 ("[M]any of our prior decisions seem implicitly to accept the equivalence of bad faith, abuse of discretion, and gross error."). This coalescence of contractual and tortious bad faith has induced three distinct forms of "bad faith" in Government contracts: (1) bad faith by specific intent to injure, (2) bad faith by fraud, and (3) bad faith by abuse of discretion. Cibinic, *Bad Faith*, at 108-10.

Bad faith by "specific intent to injure" represents the most prevalent jurisprudential understanding of bad faith. *Id.* at 108-09. As set forth in *Kalvar*, the Court of Claims recognized:

> In the cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been equated with evidence of some specific intent to injury the plaintiff. Thus, in *Gadsden v. United States*, 78 F. Supp. 126, 127, 111 Ct. Cl. 487, 489-90 (1948), the court compared bad faith to actions which are "motivated alone by malice." In *Knotts, supra*, at 128 Ct. Cl. 500, 121 F. Supp. 636, the court found bad faith in a civilian pay suit only in view of a proven "conspiracy * * * to get rid of plaintiff."

> Similarly, the court in *Struck Constr. Co. v. United States*, 96 Ct. Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was "designedly oppressive." But in *Librach, supra*, at 147 Ct. Cl. 614, the court found no bad faith because the officials were not "actuated by animus toward the plaintiff."

Kalvar, 211 Ct. Cl. at 198-99, 543 F.2d at 1302 (emphasis omitted.). Thus, bad faith under *Kalvar* (or traditional bad faith) requires a specific intent by the Government to injure the contractor. *SMS Data Prods. Group, Inc. v. United States*, 19 Cl. Ct. 612, 617, 619 (1990). Under this interpretation, the customary "irrefragable proof" standard seems justified. *See Knotts v. United States*, 128 Ct. Cl. 489, 492, 121 F. Supp. 630, 631 (1954) (requiring "well nigh irrefragable proof" of bad faith).

Bad faith also comprises bad faith by fraud. *See United States v. White*, 765 F.2d 1469, 1480 (11th Cir.1985) (finding the fraudulent estimates of a contractor as "bad faith and conscious disregard for the truth"). As with traditional bad faith, bad faith by fraud also requires "irrefragable proof * * * of deliberately fraudulent or dishonest conduct." *United States Fidelity & Guar. Co. v. United States*, 230 Ct. Cl. 355, 366-67, 676 F.2d 622, 629 (1982). In the case at bar, this Court reads the parties' stipulation of no bad faith as encompassing the preceding two forms of bad faith.[35]

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[35] While this Court accepts this stipulation, this Court notes with interest the "ironic" correlation between the Corps' estimation of increased costs under the original Corps contract of approximately $324,000, for a total of $738,000, which parallels the corps' estimated cost of $738,000 under the resolicitation of the contract. In view of the fact that the Corps approved approximately $100,000 in additional

(Footnote cont'd on next page)

Abuse of discretion may also constitute bad faith by a showing of arbitrary and capricious conduct on the part of the Government. *Id.* at 630. In *Keco Indus., Inc. v. United States*, 203 Ct. Cl. 566, 492 F.2d 1200 (1974), the Court of Claims further recited the four categories where Government action may result in arbitrary and capricious conduct:

> One is that subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal, normally warrants recovery of bid preparation costs. *Heyer Products Co. v. United States*, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956). A second is that proof that there was "no reasonable basis" for the administrative decision will also suffice at least in many situations. *Continental Business Enterprises v. United States*, 196 Ct. Cl. 627, 637-38, 452 F.2d 1016, 1021 (1971). The third is that the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable statues and regulations. *Continental Business Enterprises v. United States, supra*, 196 Ct. Cl. at 637, 452 F.2d at 1021 (1971); *Keco Industries, Inc. v. United States, supra*, 192 Ct.Cl. at 784, 428 F.2d at 1240. The fourth is that proven violation of pertinent statutes or regulations can, but need not necessarily, be a ground for recovery.

(Footnote cont'd from previous page.)

compensation to the second contractor, indeed less than the amount required by the plaintiff to complete the original Corps contract, this Court commiserates with the plaintiff's inquisitiveness over the validity of the defendant's procurement practices.

Id. at 574, 492 F.2d at 1203-04; *see also Luce v. United States*, 204 Ct. Cl. 766, 767, 498 F.2d 1348, 1349 (1974). Distinguishable from the forms of bad faith which require the high irrefragable proof standard, abuse of discretion requires a lesser burden. *See Balboa Ins. Co. v. United States*, 775 F.2d 1158, 1165 (Fed. Cir. 1985) ("Proof of * * * [deliberate or fraudulent] conduct is *not* required to prove arbitrary or capricious action or abuse of discretion on the part of the Government."). The Court of Claims recited the standard of proof as follows:

> It must be pointed out that the standard of proof to be applied in cases where arbitrary and capricious action is charges should be a high one. Final decisions should be based on the particular circumstances of each case. It will remain for plaintiff to meet this high standard by proving to the [court] that such arbitrary and capricious action as alleged did in fact exist.

Keco Indus., Inc. v. United States, 192 Ct. Cl. 773, 784, 428 F.2d 1233, 1240 (1970); *see also Continental Business Enters., Inc. v. United States*, 196 Ct. Cl. 627, 637, 452 F.2d 1016, 1021 (1971).

Thus, in contrast to traditional bad faith, the abuse of discretion defense to convenience terminations employs the totality of the circumstances approach and, thus, provides wide judicial discretion in adjudging the Government's conduct. Even in *Torncello*, the Court of Claims distinguished traditional bad faith with bad faith by abuse of discretion. *Compare Torncello*, 231 Ct. Cl. at 45, 681, F.2d at 771 ("Since good faith is presumed unless bad faith is shown, the government is prevented only from engaging in actions motivated by a specific intent to harm the plaintiff.") *with id.* at 46, 681 F.2d at 771 ("Abuse of discretion is a valuable doctrine to enable otherwise legal actions to be overturned if there seems some clear wrong nevertheless, * * *."). In *Torncello*, the Court of Claims also defines a standard for abuse of discretion:

"Discretionary matters are those about which the party having discretion may be flexible, within an otherwise legal agreement, and abuse occurs in the rare situations when something arises that seems to make that normal action unfair." *Id.*; *see also Confederated Tribes v. United States*, 177 Ct. Cl. 184, 192 (1966) (reviewing abuse of discretion by the rational basis test: "Once a rational basis has been found, the judicial function ends.")). Under this standard, therefore, this Court finds that the plaintiff has met its burden in proving a clear abuse of discretion.

The plaintiff contends that the defendant evidenced a clear abuse of discretion by terminating the Corps contract for convenience based solely upon, as defendant admitted at trial, the "cardinal change doctrine." In *Cray Research, Inc. v. Department of Navy*, 556 F. Supp. 201 (D.D.C. 1982), the district court defined the rationale of this doctrine:

> The "cardinal change" doctrine prevents government agencies from circumventing the competitive procurement process by adopting drastic modifications beyond the original scope of a contract. The basic standard is whether the modified contract calls for essentially the same performance as that required by the contract when originally awarded so that the modification does not materially change the field of competition.

Id. at 203. Thus, a cardinal change describes a change outside of the scope of the contract and thus not governed by the changes clause. Ralph C. Nash, Jr., *Cardinal Changes: A Theory Looking for a Home*, 5 NASH & CIBINIC REP. ¶ 48, at 126 (1991). Moreover, while no finite amount defines the scope of a cardinal change, the boundaries seem enormous. *Compare General Dynamics Corp. v. United States*, 218 Ct. Cl. 40, 56-57, 585 F.2d 457, 466 (1978) (finding a $100 million increase in a $60

million contract as within the scope of the contract) *with Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242, 255 (8th Cir. 1969) (deeming a treble rise in the cost of the contract as outside of the scope of the contract).

By referencing this indefinite doctrine, the defendant cited an administrative "rule of thumb" requiring convenience termination for any contract with a cost increase of twenty-five to thirty percent. Yet, even after inquiries by this Court at trial, defendant provided no administrative or legal foundation for its application of the rule. Thus, this Court finds no authority nor justification for the twenty-five to thirty percent rule cited by defendant. *See General Dynamics*, 218 Ct. Cl. at 49, 585 F.2d at 462 (recognizing that "no automatic or easy formula" exists to define a cardinal change). Because the judicially-created doctrine of cardinal change mutates with the totality of each new set of facts and circumstances, the exact boundaries of the doctrine remain malleable by the courts and thus indefinite in application. *Edward R. Marden Corp. v. United States*, 194 Ct. Cl. 799, 808, 442 F.2d 364, 369 (1971). Generally, a cardinal change is "a drastic modification beyond the scope of the contract." *Air-A-Plane Corp. v. United States*, 187 Ct. Cl. 269, 275, 408 F.2d 1030, 1033 (1969).

Notwithstanding the lack of administrative or legal authority, the CO cited the Corps' "rule of thumb" as the sole grounds for the termination for convenience of the Corps contract. At trial, the CO testified:

> The reason I terminated was because we had what is called a cardinal change, a major change * * *.
>
> * * * *
>
> Generally, we consider a cardinal change to be in the area of 25 to 33 percent of the total contract amount. That would fall into the arena for consideration as a cardinal change.

* * * *

> In this case, the whole reason for the termination was a change in the neighborhood of $300,000 to a $400,000 contract. That constituted a cardinal change.[36]

In the case at bar, however, as the CO cited no authority for his definition of cardinal change and as defendant's counsel was also unable to produce documentation for its witness' cardinal change theories, this failure resulted from a complete misunderstanding of the cardinal change doctrine. In addition to the CO's improper basis for terminating the Corps contract, the defendant also exhibited a complete disregard for fair administration of the Corps contract. After the plaintiff informed the Corps of the additional asbestos-containing materials at the Raco site in late 1985 and confirmed such in early 1986, the Corps estimated abatement requirements of 36,910 square and linear feet of floor tile and roof flashing. The Corps based these estimations solely on site plans and conducted no further site surveys or field measurements to confirm the figures. In planning the resolicitation of the Corps contract after terminating the plaintiff for convenience, the Corps further adjusted upward the estimate to 51,800 square and linear feet in 1987. As later determined, however, the Corps had substantially overestimated the abatement requirement by some 27,710 square and linear feet, using the 1986 estimates, and by 42,600 square and linear feet, using the 1987 estimates: in actuality, only 9,200 square and linear feet of asbes-

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[36] Transcript (Johnson), at 476, 486, 538.

tos-containing materials required the abatement.[37] Thus, had the Corps applied the correct calculation, the increase in costs would not have exceeded $81,170, if calculating square feet at the $8.78 unit price and liner feet at the $10.75 unit price. Therefore, even under the Corps' own "rule of thumb," had the Corps not negligently (by failing to conduct its own investigation at the site) and erroneously calculated the scope of the abatement requirements, the actual increase (approximately $81,170) would have fallen well under the twenty-five to thirty percent figure (twenty-five percent of $414,696 equals $103,674).[38] The fact that the Corps never attempted to confirm the measurements or the cost calculations with the plaintiff further demonstrates the arbitrary and capricious manner of the contract administration in the present case, even though a Corps intra-agency memoranda dated August 19, 1986, suggested consideration of Krygoski's estimates before "deciding to go [s]uspension or termination."

As this Court finds that the Corps contract contemplated the complete abatement of asbestos at the Raco site, the defendant's termination of the contract for con-

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[37] The 9,200 square and linear feet computation, moreover, could still represent an inflated calculation. While three of the eight Government samples contained less than one percent asbestos, or the threshold level requiring abatement under NESHAP, the Corps never attempted to verify the exact parameters of the asbestos-containing materials tested. Furthermore, the Corps never provided split samples to Krygoski so that the plaintiff could confirm the scope of abatement required.

[38] The CO even admitted that, had the Corps applied the correct abatement requirements, the cost increase would not have required convenience termination under the Corps' "rule of thumb." Transcript (Johnson), at 555-56.

venience, based solely upon the Corps' arbitrary "rule of thumb" which in turn relied solely upon erroneous estimations of asbestos abatement requirements, constituted an abuse of discretion by the CO in the administration of this contract.

CONCLUSION

For the reasons stated above, this Court concludes that the present case constitutes one of the rare instances of unjustifiable termination for convenience by the Government. This Court finds that the defendant improperly terminated the contract with plaintiff without the requisite factual and legal justification as required by the change of circumstances rule of *Torncello*. Also, and in the alternative, the Court finds that the Government likewise abused its discretion in terminating this contract under the *Kalvar* bad faith/abuse of discretion standard.

Therefore, this Court concludes that the defendant is liable for breach damages in its contract with the plaintiff. Since the case was earlier bifurcated, with the damage phase of the case to follow the liability decision, the parties are ordered to confer as to the status of this matter and advise this Court by filing written status reports on or before c.o.b. Monday, March 22, 1993, as to their intentions regarding further proceedings (including discovery).

Since an in-person status conference might be helpful for the parties, the Court hereby schedules the same for 10 a.m. on Wednesday, March 24, 1993, at the National Courts Building, 717 Madison Place, N.W., Washington, D.C.

In the United States Court of Federal Claims

No. 214-89C

(Filed: May 19 1995)

KRYGOSKI CONSTRUCTION COMPANY, INC.

v.

THE UNITED STATES

FILED
MAY 19 1995
U.S. COURT OF FEDERAL CLAIMS

H. Robert Showers, McLean, Virginia, attorney of record for plaintiff.

Sheryl L. Floyd, Washington, D.C., with whom was *Assistant Attorney General Frank W. Hunger*, for defendant. *Arvis Freimuts*, United States Army Corps of Engineers, of counsel.

OPINION

YOCK, *Judge*.

This is an action for breach of contract and damages brought by the plaintiff, Krygoski Construction Company, Inc. ("Krygoski"), based upon an improper termination for convenience by the United States Army Corps of Engineers ("Corps"). This Court had earlier bifurcated the action to first determine the defendant's liability, and in an Opinion dated March 2, 1993, the Court held that the Government had indeed breached its

contract with Krygoski and was liable for appropriate damages. The parties then proceeded to the damage phase of the case, and, after considerable time and effort, managed to settle most, but not all, of the damages. Those damages that have been settled are the subject of the parties' Joint Stipulations filed with this Court on April 29, 1994, and a Joint Stipulation dated September 15, 1994. The three damage issues that were not settled were tried before the Court on September 20-22, 1994, in Milwaukee, Wisconsin. The three damage issues remaining for decision by this Court are: (1) Is Krygoski entitled to damages for anticipated profits from the removal and disposal of petroleum-contaminated soil located at the contract site; (2) Is Krygoski entitled to damages for anticipated profits from the removal and disposal of the contents of contaminated storage tanks located at the contract site; and (3) Is Krygoski entitled to damages for the net replacement value of buildings located at the contract site?

Upon full consideration of the entire trial record and the parties' pre- and post-trial briefings, and for the reasons stated herein, this Court finds that the plaintiff is entitled to all of the above-described damages.

Statement of Facts

On August 12, 1985, the Corps issued Solicitation No. DACA35-85-C-0001 (the "Solicitation") for the demolition and removal of buildings and underground tanks, asbestos abatement, and other miscellaneous items at the former missile base at Raco, Michigan. The Corps estimated that a responsive bid would be $953,865. The Abstract of Offers indicates that eight contractors submitted bids in response to the Solicitation. The respective bids were as follows:

1. Associated Constructors	$904,350
2. Dore & Associates	$624,000
3. Bacco Construction Co.	$732,620
4. Bierlein Demolition	$495,275
5. L. Blondeau & Sons	$614,999
6. Julio Contracting Co.	$499,500
7. Carl Bolander & Sons Co.	$535,000
8. Krygoski Construction Co.	$414,696

On September 30, 1985, the Corps awarded Contract No. DACA35-85-C-0001 to Krygoski (the "Krygoski contract"). Soon after the award of the contract, it became apparent that the amount of asbestos abatement required at the Raco site far exceeded the estimates provided in the Solicitation. The Corps took the position, later rejected by this Court in its merit decision of March 2, 1993, that the increase in costs engendered by the additional asbestos abatement constituted a cardinal change. Accordingly, on September 5, 1986, before Krygoski had commenced the actual demolition work stipulated in the contract, but after Krygoski had completed project plans and preparation, the Corps terminated the Krygoski contract for convenience.

After the Corps improperly terminated the Krygoski contract, the Corps revised the specifications to reflect the additional asbestos abatement work required and issued solicitation No. DACA35-87-B-0001. In response, the Corps again received eight offers, including an offer from Krygoski. Pursuant to this solicitation, Anderson Excavating & Wrecking Co. ("Anderson") was awarded the contract (the "Anderson contract"). Anderson bid $443,200 to perform the work. Krygoski, on the other hand, was the sixth lowest bidder at $1,200,000.

Pursuant to this subsequent contract, Anderson was required to remove several underground fuel storage tanks. Paragraph 8.4.7.2 of the Anderson contract stated that:

> Samples shall be obtained by the Contractor from the bottom surface of the excavation and at a depth of three (3) feet below the bottom surface. If it is found that soils have been contaminated from leakage of a tank(s) such soils, as directed by the Contracting Officer, shall be removed, disposed of and new soil provided and placed in its place. All costs for the removal and disposal of existing soils and providing and placing new soils, due to leakage of a tank(s) will be paid for in accordance with applicable CONTRACT CLAUSES.

Thus, the Anderson contract required the contractor to test the soil three feet beneath the underground fuel storage tanks and report any contamination to the contracting officer. The Krygoski contract, although not containing the same clause, similarly required the contractor to report any soil contamination. During the course of performance, Anderson tested the soil beneath the storage tanks and contamination was detected. The Corps responded by ordering Anderson to put the excavated soil back into the ground and fill the holes. The Corps planned to return at a later time with drill and boring equipment in order to quantify the amount of contaminated soil. Following the conclusion of the Anderson contract, the Corps sampled the soil at the Raco site and determined that the contamination did not require any remedial action. As of the last briefing to the Court, the Corps has not yet taken remedial action with respect to the contaminated soil.

During the course of performance, Anderson contacted other unexpected conditions at the Raco site. Both the Anderson and Krygoski contracts required the con-

tractor to dispose of fluids and sludge contained in several underground fuel storage tanks. Both contracts also included an estimate of the amount of materials contained in the storage tanks. In June of 1988, while excavating the underground tanks, Anderson discovered that the underground storage tanks contained more materials than was estimated in the contract documents. Anderson submitted a proposal to reflect the work required to remove and dispose of the 40,430 additional gallons of petroleum-based liquids contained in the storage tanks. The Corps responded by issuing an equitable adjustment to compensate Anderson for the increased work.

The Raco missile base also accommodated two buildings—the Assembly and Composite buildings. The Raco site was originally used as an airfield. However, in 1960, a missile base was constructed adjacent to the airfield, and at this time the Assembly and Composite buildings were constructed. Accordingly, at the time of the breach of the Krygoski contract, the buildings were approximately 27 years old. The Assembly and Composite buildings were both Class C buildings,[1] which have life expectancies of 40 years. The buildings had painted steel structural columns and beams of exceptionally heavy duty integrity. The Assembly and Composite buildings were used to store and repair missiles when the Raco site

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[1] Buildings are ranked by type on a sliding scale starting with A, B, C, D, and concluding with S—a type A building being of the highest quality, and a type S building being of the lowest. For example, a Class D building is premanufactured with corrugated metal siding and corrugated metal roofing. A Class C building, on the other hand, is not premanufactured but has columns and steel beams which are erected on site. Moreover, there are various grades of buildings, *i.e.*, excellent, good, and average. Thus, for instance, an "average" Class C building might be superior in quality to a "good" Class D building.

was functioning as a missile base. As such, the buildings were constructed of steel with enhanced integrity, and the structures of the buildings were designed to sustain much more weight than a standard warehouse. The roof covers of the two buildings were comprised of corrugate decking, insulation, tar, and gravel. At the time of the breach, like the buildings themselves, the roof coverings were 27 years old. Both buildings had large sliding metal doors at the front so that large, bulky equipment could use the doorways to enter and exit. Finally, the Assembly building was noteworthy because a monorail system was attached to the support beams which could support and move extremely heavy weight.

In 1989, Krygoski filed the present action for breach of contract. The Court bifurcated the trial, and in a decision on the merits dated March 2, 1993, the Court held that the Corps breached its contract with Krygoski by improperly terminating the Krygoski contract for the convenience of the Government. Consequently, the parties commenced settlement negotiations. These discussions resulted in several joint stipulations as to both the quantum of damages for particular claims and as to particular facts. In these joint stipulations, the defendant admitted that if the plaintiff's contract had not been improperly terminated, Krygoski would have performed the following work and the Government would have remitted the corresponding amounts:

Asbestos abatement	$1,264,873.50
Demolition	260,940.00
Underground tank excavation/backfill	67,466.00
Additional fill work	47,234.00
Missile silo fill work	28,000.00
Topsoil, seeding, and mulching work	27,300.00
TOTAL	$1,695,813.50

In addition, the defendant stipulated that Krygoski would have realized $27,825.00 in salvage value for

tanks, rebar, and scrap. Accordingly, prior to trial, the parties entered into several stipulations providing that the plaintiff would have realized total contract revenue of $1,723,638.50 (minus costs) if not for the Corps' improper termination for convenience. The defendant also entered into a Joint Stipulation, dated September 15, 1994, regarding the plaintiff's delay and disruption claim in which the defendant agreed to settle Krygoski's claim for delay costs in the sum of $38,000. Thus, prior to trial, the parties settled most of the damage claims precipitated by the Government's breach.

As already noted, the parties also entered into several joint stipulations as to facts. First, the defendant stipulated that the Corps would have been required by law to remove and dispose of 3,617 cubic yards of contaminated soil. Second, the defendant admitted that, by contract, Krygoski would have been required to excavate 30,383 cubic yards of soil "pursuant to item No. 4 of the Contract."

As a result of the above-described stipulations, the Court is confronted with damage claims pertaining to only three issues. First, the plaintiff claims entitlement to anticipated profits from the removal and disposal of petroleum-contaminated soil located beneath the underground fuel storage tanks. Second, the plaintiff avers a claim for anticipated profits from the removal and disposal of 40,430 additional gallons of petroleum-based liquids contained in the underground fuel storage tanks. Last, the plaintiff claims that it should recover damages equivalent to the replacement value of the Assembly and Composite buildings which were located at the Raco site.

Discussion

To recover contract damages, a litigant must prove more than simply a breach of contract on the part of a defendant. A defendant is only liable for those damages which were reasonably foreseeable, at the time of con-

tracting, as a natural result of a breach. *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854).

A. Anticipated Profits From the Removal and Disposal of the Contaminated Soil

With respect to the plaintiff's first claim for anticipated profits from the removal and disposal of the contaminated soil, the defendant proffers two arguments to disavow liability.

First, the defendant argues that the Corps was not required to remove the contaminated soil. The defendant, however, entered into a joint stipulation with the plaintiff admitting that 3,617 cubic yards of contaminated soil had to be removed and disposed of *by law*. In general, stipulations should remain binding upon the parties unless the Court, in its discretion, finds that there exist special circumstances which warrant relieving a party of the stipulation. *John McShain, Inc. v. United States*, 179 Ct. Cl. 632, 635, 375 F.2d 829, 831 (1967) ("A stipulation is a judicial admission binding on the parties making it[,] absent special considerations.") The defendant contends that it should be relieved from this stipulation because facts introduced at trial establish the falsity of the stipulation. As support for its contention, the defendant cites to *H.B. Zachry Co. v. United States*, 170 Ct. Cl. 115, 344 F.2d 352 (1971), which held that:

> A court may relieve a party of his stipulation if necessary to prevent an injustice, particularly where facts contrary to the stipulation are established by the evidence.

Id., 170 Ct. Cl. at 123, 344 F.2d at 357. The defendant claims that its introduction of evidence establishing that the Corps has not yet removed the contaminated soil from Raco establishes "facts contrary to the stipulation."

This Court, however, finds that the evidence proffered by the defendant does not satisfy the threshold estab-

lished in *H.B. Zachry*. The defendant's argument can be distilled into three components: (1) it informed the State of Michigan Department of Natural Resources that the Raco demolition would be "handled in accordance with applicable Federal, State, and Local regulations"; and (2) the contaminated soil remains at the Raco site today; so (3) allowing the contaminated soil to remain at the Raco site must conform with the law. The defendant believes that such circular logic establishes that the law did not require the Corps to remove and dispose of the contaminated soil at the Raco site. In this Court's view, this simply establishes that the contaminated soil has been removed. There has certainly been no credible proffer by the defendant that its actions conformed with the laws of Michigan at the time the Krygoski contract would have been performed, or that taking no remedial action with respect to the contaminated soil would have been a plausible course of action at that time. To the contrary, the Court believes that the facts introduced at trial establish that the law in effect at the time the Krygoski contract would have been performed compelled the removal and disposal of the contaminated soil. Mr. Jerome Hagen, the president and chief engineer of Cory Laboratories, testified as the plaintiff's expert on environmental regulatory matters. Mr. Hagen is an environmental expert who worked with Krygoski Construction Company, Inc., to ensure that it complied with current environmental laws during its projects. He testified that the laws of Michigan, at the time the contract would have been performed, would have required removal and disposal of the contaminated soil. Mr. Hagen also testified that, at the time the Krygoski contract would have been performed, the Michigan Department of Environmental Resources required that contractors immediately remove any contaminated soil found at the contract site. At trial, Mr. Hagen recounted the State of Michigan law at the time the contract would have been performed:

> By law, the laws of the State of Michigan, they would have to be remediated, which the only option they were accepting at the time was removal.

For the foregoing reasons, this Court finds no cause to relieve the defendant of its joint stipulation. Accordingly, the Court finds that, *by law*, the Corps would have been required to remove and dispose of the 3,617 cubic yards of contaminated soil encountered at the Raco site.

The next question before the Court is whether Krygoski would have been the contractor to remove and dispose of the soil. The defendant points to the Anderson contract to buttress its contention that Krygoski would not have performed the removal and disposal work. The Anderson and Krygoski contracts required the contractor to notify the contracting officer if contaminated soil was encountered at the Raco site. However, neither contract required the contractor to quantify the extent of the contamination. The defendant interprets these provisions as vesting in the contracting officer the discretion to order the contractor to remove the soil or to simply replace the soil and quantify the contamination at a later time. The defendant then points out that pursuant to these contract provisions, the contracting officer directed Anderson to refill the excavated areas, and Anderson was never subsequently directed to either quantify the extent of the contamination or to remove and dispose of any of the contaminated soil located in the underground tank areas. Accordingly, the defendant opines that since the Krygoski contract contained provisions analogous to those in the Anderson contract, the contracting officer would have followed the same course of action with respect to the Krygoski contract as it did in the Anderson contract—that is, not have the contractor remove and dispose of the soil.

The defendant's argument analogizing the Anderson contract to the Krygoski contract is ineffectual because

the underpinning of the argument is that the Corps was not required by law to remove or dispose of the soil. As discussed *supra*, by joint stipulation, the defendant *admitted* that, by law, the Corps was required to remove and dispose of 3,617 cubic yards of contaminated soil. With this premise firmly in place, it is obvious for several reasons that Krygoski would have been ordered by the contracting officer to perform the removal and disposal work. First, if the Corps was required by law to remove and dispose of the contaminated soil, the Corps would had to have been much more expeditious in quantifying the extent of the contamination. Thus, the Corps would have been unable to order Krygoski to simply refill the holes and allow numerous months to pass before the extent of the contamination was determined, as it did with the Anderson contract. Rather, the Corps would have had to quantify immediately the extent of the contamination, and Krygoski, as the contractor already at the Raco site, would most likely have been the contractor to perform the work. The Court believes that it would have been unreasonably expensive and time consuming to rebid the one item of disposing and removing the contaminated soil when Krygoski was already at the work site with the required machinery to perform the task. Accordingly, when one commences from the premise that the Corps was required by law to remove and dispose of the contaminated soil, it is clear that the Krygoski contract would have been performed in a fashion far different from the Anderson contract.

There is also a second flaw in the defendant's position. The defendant entered into a second joint stipulation which, upon close examination, compels the conclusion that, *by contract*, Krygoski would have been required to excavate the contaminated soil. The defendant stipulated that the plaintiff would have excavated 30,383 cubic yards of soil pursuant to item No. 4 of the contract. Item No. 4 relates to the excavation required to remove

the underground tanks; in other words, the exact area where the 3,617 cubic yards of contaminated soil was located. To understand the import of this joint stipulation, one must examine the Plaintiff's Preliminary Accounting Summary (the "Accounting Summary"). The Accounting Summary, too, indicates that the plaintiff would have excavated 30,383 cubic yards of soil pursuant to item No. 4 of the contract. However, the Accounting Summary also catalogs the excavation required:

Work Description	***Quantity Unit***
a.) First 6,700 Cubic Yards	6,700 C.Y.
b.) Over 6,700 Cubic Yards	3,300 C.Y.
c.) Additional Excavation to Remove Contaminated Soil	20,383 C.Y.
TOTAL	30,383 C.Y.

The Accounting Summary, by including excavation "to remove contaminated soil," clearly included within the 20,383 cubic yards of excavation the 3,617 cubic yards of contaminated soil. By examining the joint stipulation in conjunction with Krygoski's Accounting Summary, it is evident that the joint stipulation was entered into based on the same breakdown of excavation amounts and costs as the Accounting Summary. Since the Accounting Summary included 20,383 cubic yards of excavation to "remove contaminated soil," the only conclusion is that the joint stipulation similarly accounted for this work. Thus, the only possible inference is that included within the 20,383 cubic yards of excavation, which the defendant stipulated Krygoski would have been required to excavate pursuant to the contract, is the 3,617 cubic yards of contaminated soil. The defendant has not responded to this argument and has not requested relief from this joint stipulation. Accordingly, this Court is compelled to conclude that, *by contract*, Krygoski would have been required to excavate the 3,617 cubic yards of contaminated soil from the Raco site. It would be fallacious to

argue that once Krygoski excavated the soil, the Government would then have contracted with another entity to remove and dispose of the soil when Krygoski was already present at the Raco site. The costs in terms of time and money would be unreasonable.

Accordingly, the Court concludes that if Krygoski had performed the contract, it would have been ordered to excavate, remove, and dispose of the 3,617 cubic yards of contaminated soil located beneath the underground fuel storage tanks at the Raco site.

The next question, then, is what is a reasonable profit for the removal and disposal of the contaminated soil. In formulating its claim for damages, the plaintiff submitted a worksheet cataloging its projected billings and projected costs for the removal and disposal of the contaminated soil. The difference between these two sums was proffered as the plaintiff's anticipated profit, and, thus, its damage claim. A summary of the plaintiff's damage claim pursuant to this formula is as follows:

Projected Billings	$154,040.80
Projected Costs	$ 99,467.50
Projected Profit	$ 54,573.30

As is obvious from this table, the plaintiff's damages result in a profit rate of approximately 54 percent of Krygoski's projected costs. The defendant counters that this methodology is completely inadequate. The defendant argues that if the additional work engendered by the contaminated soil had been contracted out to Krygoski, it would have resulted in a change order. According to the defendant, the Corps would commence negotiating a change order with the contractor's projected costs, not its projected billings. The Corps would then negotiate a reasonable profit rate based on the contractor's projected costs, which would be in the range of 8 to 12 percent, not 54 percent.

The Court agrees with the Government's assessment on this issue. The Court concurs that the damages in this instance should be a function of Krygoski's projected costs, with a reasonable rate of profit. Also, the Court simply cannot fathom any Government agency allowing a contractor to garner over 50 percent profit on any work. In this instance, the quantum of damages proffered by the plaintiff is inadequate. As such, the Court believes that the plaintiff should be awarded damages equal to 12 percent of its projected costs of $99,467.50, or $11,936.10. Although a 12-percent rate of profit is slightly higher than what the defendant proffered would be the standard rate for a change order, the Court believes that this higher rate reflects the dangers inherent in hauling and disposing of hazardous materials and also accounts for the fact that the soil would have been disposed of at a landfill owned by Mr. Krygoski, Michigan Environs.[2] The estimate of profit provided at trial by the defendant's witness, Mr. Rossow, provides support for this award. According to Mr. Rossow, the Corps' estimate of the average rate of profit on the removal and disposal work was $3.22 per cubic yard.[3] Accordingly, to remove and

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[2] Michigan Environs was the only plausible landfill because Dafter was the only landfill closer to Raco, and Dafter was involved in litigation with Chippewa County at the time the contract would have been performed. Thus, Dafter was not eligible to receive the soil pursuant to the Krygoski contract, which prohibited disposing of materials at any landfill which was the subject of litigation.

[3] According to Mr. Rossow, in negotiating a change order, the Corps prepares an estimate of a contractor's costs for the work at issue. In preparing its estimate, Mr. Rossow determined the average bid of the contractors who responded to the solicitation which resulted in the Anderson contract for the excavation, removal, and disposal of contaminated soil located in other areas at the Raco site. According to Mr. Rossow's estimate, the average bid, excluding the high and low bids,

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dispose of 3,617 cubic yards of contaminated soil, the Corps estimated that a contractor would realize a profit of $11,646.74. This is similar to the award structured here by the Court, *i.e.*, $11,936.10.

B. Anticipated Profit From the Removal and Disposal of 40,430 Gallons of Underground Tank Fluids

The plaintiff's second claim for damages is for anticipated profit from the removal and disposal of the 40,430 additional gallons of tank fluids discovered in the underground fuel storage tanks during the performance of the Anderson contract. Both the Anderson and Krygoski contracts required that the contractor remove any tank contents before disposing of the underground tanks. Both contracts also provided estimates of the amounts of fluids and sludge contained in these tanks. However, during performance of the Anderson contract, Anderson discovered more petroleum-based liquids than the contract estimated. As such, the Corps made an equitable adjustment to the Anderson contract to provide for the additional work. Krygoski claims that if it had been allowed to perform the contract, it, too, would have received an adjustment to perform the additional work. As such, Krygoski is claiming damages for the profit it would have secured from the removal and disposal of the additional tank contents. The defendant does not dispute that Krygoski would have performed the additional work.

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was $35.39 per cubic yard. Mr. Rossow then assumed that the contractor included in its bid a profit rate of 10 percent—10 percent because contractors realize that this is what the Corps believes is a fair and reasonable rate of profit. Finally, Mr. Rossow determined the Government estimate of profit as $3.22 per cubic yard ($35.39 – ($35.39/1.10)).

Rather, the defendant challenges the quantum of damages claimed by Krygoski.

During the trial, Krygoski proffered a worksheet cataloging its anticipated billing and anticipated costs for the removal and disposal of the additional tank contents. In its anticipated billing, Krygoski submitted a price of $97,805, which was simply a regurgitation of the sum Anderson negotiated as a change order for the work. Krygoski also proffered its anticipated costs: (1) 9,300 gallons of fuel oil cut, at $.84 per gallon, to dilute and liquify the petroleum-based contents so that the contents could be removed from the tanks (total cost: $7,812.00); (2) vacuum pump rental to remove the tank contents for five days at a rate of $240.00 per day (total cost: $1,200.00); (3) hauling costs for five trips from Raco to Pontiac, Michigan, which is a round trip distance of 650 miles. The cost per mile is estimated as $2.00 (total cost: $6,500.00); (4) the tanks contained 36,000 gallons of material with a flashpoint over 140 degrees Fahrenheit, which is disposed of at a rate of $.40 per gallon (total cost: $14,400.00); (5) the tanks also contained 13,730 gallons of material with a flashpoint less than 140 degrees Fahrenheit, which is disposed at a rate of $.70 per gallon (total cost: $9,611.00); and (6) overhead costs at a rate of 25 percent totaling $9,880.75. Accordingly, Krygoski's total projected costs for the removal and disposal of the additional tank contents is $48,403.75. As its damages, then, the plaintiff simply submits the difference between its projected billing, $97,805.00, and its projected costs, $48,403.75, or approximately $49,000.00.

The defendant raises a number of objections to the quantum of Krygoski's claim for damages. Initially, the defendant points out that Krygoski based its damage claim on the difference between its projected billing and projected costs. The defendant again argues that the

Corps, in negotiating a change order, negotiates on the basis of the contractor's projected costs and then determines a fair and reasonable rate of profit based on that figure. Moreover, even assuming that Krygoski's methodology is permissible, Krygoski submits, as its projected billing, the amount negotiated by Anderson as a change order for the removal and disposal of the additional tank contents. The defendant charges that this is wholly inadequate. Moreover, the defendant posits that this methodology results in a profit rate of 100 percent for Krygoski, and, according to Mr. Rossow, the Corps' rule of thumb is that a contractor obtain a rate of profit in the range of 8 to 10 percent.

Also, the defendant raises a number of challenges to Krygoski's projected costs. The defendant argues primarily that Krygoski anticipated recycling some 49,720 gallons of the petroleum products contained in the underground tanks at $.30 per gallon. Thus, Krygoski would have earned $14,916 by salvaging these petroleum products. The defendant argues that the Court should reduce Krygoski's costs by this sum because in negotiating a change order, the Corps would expect a contractor to include in its proposal any means by which costs could be reduced, including salvage, and that the Corps would not allow a contractor to "share in the savings" by retaining these sums. Moreover, the defendant contends that since Krygoski planned to recycle the petroleum products, it would not have incurred disposal costs. Thus, the defendant argues that the Court should reduce Krygoski's costs by the $24,000 Krygoski submitted as its disposal costs. Finally, the defendant argues that Krygoski's trucking costs should be reduced by approximately $3,000 because in recycling the materials, Krygoski would only have to travel to Menominee, which is a 360-mile round trip, and not Pontiac, Michigan, as Krygoski claimed, which is a 650-mile round trip.

Initially, as with Krygoski's claim for damages based on the removal and disposal of the contaminated soil, this Court agrees with the defendant that the plaintiff presents an unrealistic methodology for determining damages. Since this additional work would have been the subject of a change order, the plaintiff's damages must be based on its projected costs, not the difference between Krygoski's projected billing and projected costs. In addition, the Court finds that Krygoski, in negotiating the change order, would have presented the Corps with its plan to recycle the petroleum-based liquids which it removed from the underground tanks. As such, Krygoski's projected costs are reduced (1) by $24,011, which is the cost to dispose of the materials found in the underground tanks; and (2) by $2,900, which is the difference in hauling costs to transport the materials from Raco to Menominee instead of from Raco to Pontiac. Pursuant to this analysis, Krygoski's costs are reduced to $15,765.[4] To these costs, the Court shall apply a profit rate of 12 percent which the Court believes is reasonable considering the dangers inherent in transporting hazardous and flammable materials. Thus, Krygoski is awarded anticipated profits from the removal of the additional tank contents of $1,891.80.

However, the Court believes that the Government is also liable for any profits Krygoski would have earned from recycling the petroleum-based liquids. The defendant argues that Krygoski's costs, and implicitly its damages, should be reduced because Krygoski planned to

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[4] The Court comes to this sum by reducing Krygoski's proffered projected costs of $39,523 by $24,011 and $2,900 for a total of $12,6120. The Court then added 25 percent of overhead costs, which is $3,153.

recycle the material. However, the defendant then takes the dubious position that it is not liable for the profits Krygoski would have realized from recycling the material because the Corps would not allow a contractor to "share in the savings" if this work was performed pursuant to a change order. While this may be the case, the Court, in this instance, is awarding damages for breach of contract, not solely for profits Krygoski would have realized simply through change orders. Rather, the Court is awarding damages equivalent to any profits Krygoski would have received if it had been allowed to perform the contract. If the defendant insists that Krygoski would have recycled the material, it cannot then deny liability for the profits Krygoski would have received from the recycling scenario. As such, Krygoski is awarded the salvage value of $14,916 (49,720 gallons of material at a rate of $.30 per gallon) which it would have realized if it had recycled the additional tank contents. Thus, the total damages awarded on the plaintiff's tank content claim is $16,807.80.

C. Replacement Value of the Assembly and Composite Buildings

The third and final claim for damages at issue here relates to Krygoski's claim for the replacement value of the Assembly and Composite buildings located at the Raco site. Krygoski claims that it planned to disassemble the buildings, then reassemble the Assembly building at Krygoski's landfill, Michigan Environs, and the Composite building at a marina that Krygoski planned to develop in Menominee.

The defendant first argues that this claim for damages was unforeseeable at the time Krygoski and the Corps contracted. Only those damages that were foreseeable at the time of contracting are recoverable in an action for breach of contract. *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854); *Northern Helex Co. v.*

United States, 207 Ct. Cl. 862, 888, 524 F.2d 707, 721 (1975), *cert. denied*, 429 U.S. 866 (1976). However, the breaching party does not have to have had actual notice that a particular claim would be made by the aggrieved party if a breach occurred. Rather, "[w]hen one makes a contract[,] one takes the risk not only of those consequences that one actually did foresee, but also of those that one ought reasonably to have foreseen." E. Allan Farnsworth, FARNSWORTH ON CONTRACTS, Volume III, sec. 12.14, at 245. Thus, the Court must determine whether, objectively, a claim based on the anticipated use of the Assembly and Composite buildings was reasonably foreseeable.

As evidence of the lack of foreseeability, the defendant points to a number of facts which it argues established to the Corps that the Assembly and Composite buildings had no value. For one, the defendant points out that the buildings had been abandoned since 1973 and had been vandalized and exposed to the elements for much of this time. In addition, the defendant points to a history of the Raco site compiled by the Corps in response to an inquiry by the Michigan Department of Natural Resources about the Raco site:

> The salvage activities, combined with the unauthorized removal of items by trespassers, left little of value at the site which could be classified as salvageable, except for structural steel and portions of mechanical systems in the two large buildings remaining on the site.[5]

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[5] To the Court, this statement seems to suggest, contrary to the defendant's claim, that the structures of the buildings did have value. However, all contentions with regard to this statement are irrelevant

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The defendant also notes that the United States Forest Service ("USFS") had contracted for the sale of six buildings, a water tower, and twenty-eight missile silos in 1978 at the Raco site, but neither the Assembly building nor the Composite building were the subject of this sale. Finally, the defendant recounts that on July 11, 1983, the USFS transferred to Chippewa County the salvage rights to the Assembly and Composite buildings for $1.00 conditioned upon the demolition of the two structures. However, the county never exercised its salvage rights to the structures.[6] The defendant posits that these facts firmly establish that the Corps could not have reasonably foreseen that, in entering the contract, Krygoski contemplated resuing the Assembly and Composite buildings.

Krygoski rejoins that since its contract vested title to the buildings in the contractor, it was reasonable for the Corps to presume that Krygoski would make some use of the buildings. Moreover, Krygoski believes that the disparity between its bid and those of the other contractors should have put the Corps on notice that Krygoski perceived value in the buildings which persuaded it to lower

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since the statement was made in 1987 while the Krygoski contract was entered into in 1985, and the dispositive inquiry for determining whether a particular claim for damages was foreseeable is at the time of contracting.

[6] The defendant also points to an appraisal report prepared by Valtec Associates, Inc. ("Valtec"), in 1987 appraising the buildings. However, this proffer is ineffectual because the appraisal was prepared subsequent to the date that Krygoski and the Corps entered into the subject contract, and *Hadley* and its progeny require a determination as to whether a claim for damages was foreseeable *at the time of contracting.*

its bid. Krygoski also asserts that the Corps' contract with Chippewa County to salvage the buildings gave the Corps notice that there was value in the buildings which a contractor would employ. Finally, Krygoski submits that, because the Corps knew of the exceptional quality of the structures, it would be highly likely that a contractor who received the contract would reuse those structures.

As discussed earlier, a particular claim for damages only has to have been reasonably foreseeable for a breaching party to be liable. Considering the facts presented, the Court concludes that for two reasons the Corps should have reasonably foreseen that Krygoski contemplated using the Composite and Assembly buildings. First, the Corps knew that the buildings had fairly substantial inherent value. The buildings were not of standard warehouse quality. As discussed, the buildings were designed to house and store missiles, and in the case of the Assembly building, move missiles on a monorail system attached to its support beams. As such, the steel structures were of enhanced integrity and the designs were of exceptionally high quality. Second, Chippewa County had contracted to obtain the salvage rights to the buildings in 1983, only two years before the subject contract was entered into. While it is true that Chippewa County never exercised its rights, the Court believes that this is not dispositive. Moreover, in the Abstract of Bids for the Anderson contract, the Corps itself estimated that the asbestos work required for the Composite and Assembly buildings was $72,000. More telling, however, is that the average bid for the asbestos abatement work under the solicitation, which resulted in the Anderson contract, was approximately $355,000. It is highly likely that Chippewa County also realized the significant amount of asbestos abatement required before the buildings could be salvaged and found it prohibitive. In addition, Mr. Rossow testified that the Government

was aware, at the time it attempted to sell the salvage rights to Chippewa County, that the buildings required significant asbestos abatement. Thus, the Government should reasonably have known that the significant costs to abate the asbestos in the Assembly and Composite buildings prior to salvaging the structures was a factor in Chippewa County choosing not to exercise its salvage rights. Moreover, Chippewa County would have had to demolish the structures itself and absorb these costs in order to salvage the structure. Krygoski, on the other hand, would have performed the asbestos abatement and demolition pursuant to the contract. As such, it was more likely that Krygoski would contemplate reusing the buildings. Accordingly, this Court finds that the plaintiff's damage claim for the value of the Assembly and Composite buildings was reasonably foreseeable at the time the Corps entered into its contract with Krygoski.

The final inquiry, then, relates to the value of the Assembly and Composite buildings. The plaintiff and the defendant disagree on a number of issues in relation to determining the value of the Assembly and Composite buildings. To understand the significance of these variances, one must first comprehend the methodologies employed to determine value. Both the plaintiff and the defendant employed what is termed the cost approach methodology in determining value. The cost approach attempts to discern the cost to replace a property with one of similar utility. This value is termed the reproduction cost new of a building. A reduction is then applied to account for depreciation, the cost of disassembling and reassembling the components, and, in the case of the defendant's analysis, the percentage of the value attributable to the erection of the components to determine the net value lost to Krygoski.

However, while the plaintiff and the defendant both applied the cost approach, each applied different vari-

ations, and this is the first source of contention between the parties. The plaintiff applied what can be described as a cost-per-square-foot approach. This methodology determines the reproduction cost new by applying a figure representing the quality of the components per square foot and then multiplying this figure by the area of the buildings in square feet. The defendant, through its expert witness, Mr. Phillip, applied a weight analysis.[7] This methodology assigns a value to the components per ton. This value is then multiplied by the total tonnage of the individual components. This figure is then further reduced by the percentage of the value which represents the cost of the materials, as opposed to the costs of erection.[8] Of course, under both methodologies,

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[7] The plaintiff challenges the validity of all the defendant's conclusions. The defendant's results were the product of an appraisal report by Valtec. However, the appraisal was prepared to determine what a contractor would pay to enter the Raco site, demolish the buildings, and use the resulting components. Thus, the appraisal was prepared with the assumption that the contractor who would use the components would have to also assume the costs of demolishing the buildings and abating the asbestos. Working under this assumption, Valtec determined that a contractor would pay a nominal amount for the salvage rights to the buildings because the cost to demolish the buildings and abate the asbestos was greater than the salvage value of the buildings. Of course, this assumption is invalid in this case because Krygoski would have been paid pursuant to the contract to perform the demolition and asbestos abatement, and Krygoski did not plan to slvage the buildings for scrap, but to reuse them. For this reason, the plaintiff challenges the entirety of the defendant's conclusions. However, this Court believes that many of the elements of the report as they relate to the value of the buildings are still useful and relevant.

[8] Apparently valuation services do not distinguish between material costs and the costs of construction. Since the plaintiff only planned to use the materials, the initial reproduction costs new must

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the final figure is reduced by a rate of depreciation and the costs to disassemble and reconstruct the buildings. The parties also disagree as to the appropriate rate of depreciation. The plaintiff argues that a depreciation rate of 20 percent is adequate, while the defendant rejoins that a depreciation rate of 49 percent is more appropriate. Finally, the parties differ on the cost to disassemble the buildings. The plaintiff points out that Krygoski was paid pursuant to the contract to demolish the buildings. Thus, the plaintiff contends that there should not be a reduction to account for the costs to disassemble the buildings. The defendant, on the other hand, posits that at least 500 to 1000 additional man hours would have been incurred to disassemble the buildings piece by piece as opposed to simply demolishing the structures.

Pursuant to the plaintiff's formulation, the net value of the Composite building was $203,345.60, and the net value of the Assembly building was $60,063.55. In coming to these determinations, the plaintiff commenced with reproduction costs of $12.50 per square foot for the Composite building, which had 25,920 square feet, and $15.00 per square foot for the Assembly building, which had 5,950 square feet. The plaintiff then reduced the respective values by a depreciation rate of 20 percent. As a result, the final reproduction costs per square foot of the buildings were $10.00 and $12.50, respectively. However, the plaintiff then added a value premium of 15 percent due to, as was discussed earlier, the above standard quality of the structures. The result was a total value of $298,080.00 for the Composite building and a total value

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be adjusted to determine what ratio of the total cost of constructing the components represents the costs of the material.

of $85,531.25 for the Assembly building.[9] The total value of each building was then reduced by the projected costs to reconstruct each building on the prospective sites—$94,734.40 for the Composite building and $25,467.70 for the Assembly building. As a result, the plaintiff proffers $203,345.60 and $60,063.55, respectively, as its claim for damages to reflect the net value lost to Krygoski.

Conversely, the defendant computed the value of the buildings by an approach focusing on the weight of the individual components. The defendant stated that the total unit cost is approximately $1,448 per ton. The defendant then multiplied this unit cost by the total weight of the building and roof frames, which was estimated as 208,200 pounds for the Composite building and 58,700

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[9] These figures were arrived at in the following manner:

1)	Composite Building		
	a) Reproduction Cost (25,920 square feet at $10.00 per square foot, assumes standard materials and 20 percent depreciation)	$ 259,200.00	
	b) Value premium (15 percent)	38,800.00	
	TOTAL		$ 298,080.00
2)	Assembly Building		
	a) Reproduction Cost (5,950 square feet at $15.00 per square foot, assumes standard materials and 20 percent depreciation)	$ 74,375.00	
	b) Value premium (15 percent)	11,156.25	
	TOTAL		$ 85,531.25

pounds for the Assembly building, or 266,900 total pounds.[10] Based on this data, the replacement cost new of the buildings is $193,236.[11] However, as discussed earlier, the defendant reduced this figure by 21 percent to determine what percentage of the $193,236.00 relates to the costs of the materials, which produces a sum of $152,656.44. The final step in this analysis was to account for depreciation. It was introduced at trial that the buildings were 27 years old. Thus, according to the Marshall Valuation Service (the "Marshall Service"), 27-year-old Class C buildings, such as the Assembly and Composite buildings, would have depreciated by 49 percent. Accordingly, pursuant to the defendant's analysis, the reproduction cost new, adjusted for depreciation of 49 percent, is $77,854.79. The defendant argues that there is a final adjustment for which the Court must account. The defendant argues that disassembling the buildings would require 500 to 1000 additional man hours beyond simply demolishing the structures.

In general, the Court agrees with the methodology applied by the plaintiff. It seems to the Court that a methodology which focuses on the quality of the individual components per square foot, as opposed to simply examining the weight of the structure, better quantifies the value lost to this contractor. Thus, the Court will determine the reproduction cost new of the buildings on the

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[10] The plaintiff also challenges the defendant's analysis with respect to the total weight proffered pursuant to the defendant's formulation. The plaintiff argues that, contrary to the defendant's contention, the weight of the roof covers of both buildings and the monorail in the Assembly building should be included in the computation.

[11] 266,900 pounds or 133.45 tons (2,000 pounds = 1 ton) at $1,448 per ton = $193,236.

basis of the square foot area of the Assembly and Composite buildings. There still remains, however, the question of what was the value of the buildings per square foot. The plaintiff has proffered, before accounting for depreciation, values of $12.50 per square foot for the Composite building and $15.50 per square foot for the Assembly building. Simply as a point of comparison, the defendant's values derived by a weight analysis, if divided by the square footage of the buildings, yields a value of $4.70 per square foot. Thus, the plaintiff's values per square foot are approximately two and a half times that of the defendant's values. The appraisal submitted by the plaintiff, however, provides no basis for the plaintiff's figures. The plaintiff's expert, Mr. Madacey, claims that he relied upon the Marshall Service and on two manufacturers in the Menominee, area to derive the values per square foot for the buildings. However, neither in Mr. Madacey's testimony nor in his appraisal is there any reference to the figures that these sources provided. The Valtec appraisal, however, did prove helpful on this point. In a section apart from that to which Mr. Phillip cited during the trial, it, too, described a square-foot-value analysis using the Marshall Service. According to the Marshall Service, the Composite building is valued at $9.84 per square foot and the Assembly building is valued at $10.17 per square foot. Accordingly, the plaintiff derived a premium of some $3.00 and $5.00 per square foot above the values provided by the Marshall Service for the Assembly and Composite buildings, respectively. The Court is at a loss as to how these premiums were derived because no supporting data was provided to the Court. Considering the evidence before it, however, the Court concludes that the plaintiff's estimates of the per-square-foot value of the buildings were unreasonable. This is a result of the paucity of supporting data submitted by the plaintiff to support its conclusions and

the inexplicable premium above the Marshall Service's value offered by the plaintiff.

The Court is thus left with value determinations proffered by both parties which it finds unsatisfactory. The Court will therefore look to other sources for value determinations. As discussed earlier, Valtec also applied a cost approach per square foot to determine the reproduction costs new of the buildings by relying on the Marshall Service. In fact, while the defendant's expert, Mr. Phillip, focused at trial on his more conservative valuation determined by weight, it was this square-foot valuation which Valtec adopted in its appraisal report. According to the Marshall Service, the value of the Composite and Assembly buildings was $9.84 per square foot and $10.17 per square foot, respectively. The Court finds these values more plausible than either value proffered directly by the parties and will apply these figures in determining the reproduction costs new of the buildings. The Court will now engage in a three-step analysis to determine the total value of the buildings: (1) apply these values to the total square feet of the Assembly and Composite buildings, (2) reduce these figures by 79 percent to determine the percentage which the material costs represent in these sums, (3) reduce the figures further to account for depreciation, and (4) adjust the total reproduction costs new of the two buildings to account for the above-standard materials of which the Assembly and Composite buildings were comprised.

Thus, the reproduction cost new of the Composite building is $255,052.80 ($9.84 per square foot x 25,920 square feet), and the reproduction cost new of the Assembly building is $60,511.50 ($10.17 per square foot x 5,950 square feet). According to the defendant, material costs represent 79 percent of the total cost of constructing the components; so the reproduction costs new, without accounting for depreciation, are $201,491.71 for the

Composite building and $47,804.08 for the Assembly building.

As discussed earlier, however, the Court must adjust these figures to account for depreciation. The proper rate of depreciation is a point of contention between the parties. The defendant argues that the correct rate of depreciation is 49 percent. The plaintiff rejoins that the appropriate rate is 20 percent. The plaintiff's rate is a blended rate which accounts for the roof and the structure. Most of the depreciation, however, pertains to the roof because it was Mr. Madacey's opinion that the structures of the buildings experienced little to no depreciation. The Court is inclined to agree with the plaintiff on this point. The defendant's rate of depreciation relates to a building in the aggregate—that is, the walls, roof, floors, and the structure. However, Krygoski only planned to use the roof panels and the steel structure. Even Mr. Phillip admitted that it was likely that the steel structure itself, much like a steel bridge, might have a life expectancy of over 50 years and possibly closer to 100 years. As such, the rate of depreciation for the structural steel would concomitantly decrease to under 10 percent.[12] In addition, there was testimony that the steel was painted over which would most likely curb much of the corrosive conditions which the steel might have experienced. On the other hand, with respect to the roofs, they, like the buildings, were 27 years old and had life expectancies of between 40 and 50 years. Thus, the roofs experienced

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[12] The rate of depreciation is a function of a structure's obsolescence and physical deterioration. As such, the rate of depreciation is inextricably intertwined to the structure's age and its life expectancy. Thus, if the life expectancy of a structure increases, the rate of depreciation necessarily decreases.

much more depreciation than the steel structures. For these reasons, the Court finds that a blended rate of 25 percent appropriately accounts for the nominal depreciation experienced by the steel structures and the higher rate of depreciation for the roofs. The Court, then, will reduce the reproduction costs new by a depreciation rate of 25 percent. The reproduction cost new of the Composite building was calculated as $201,491.71; reduced by 25 percent depreciation, the reproduction cost new is $151,118.78. The reproduction cost new of the Assembly building was calculated as $47,804.08; thus, a reduction of 25 percent results in a reproduction cost new of $35,853.06.

The final adjustment to determine the total value is to account for the enhanced quality of the Assembly and Composite buildings. There was testimony from both the plaintiff and the defendant that the Assembly and Composite buildings were of enhanced structural quality. The buildings were designed to store and move missiles. As such, the structures were designed to sustain incredible amounts of weight. In addition, a monorail system attached to the support beams of the Assembly building could transport very heavy weights. Once again, this is an indication that the structures were of an enhanced design quality. Moreover, the integrity of the steel itself was of a quality far above normal. The plaintiff accounted for this by increasing the reproduction costs new by a factor of 15 percent. The defendant's expert, Mr. Phillip, also indicated that under his analysis by weight, he derived a value which accounted for the enhanced quality of the structure which was greater than 15 percent. As such, the Court will enhance the total reproduction costs new of the two buildings by 15 percent to account for the enhanced structural quality and enhanced integrity of the structural components. Accordingly, the Court determines that the total value of the Assembly and Composite buildings is $215,017.61.

The final step to determine the net value lost to the plaintiff is to reduce the total value of the two buildings by the costs the plaintiff would have incurred to disassemble the buildings and then reconstruct them. With respect to whether there should be any accounting for the costs to disassemble the buildings, the plaintiff and defendant diverge. The plaintiff claims that since Krygoski was being paid pursuant to the contract to demolish the buildings, no additional charges should be introduced for disassembling the buildings because it would have taken Krygoski an equivalent amount of time to disassemble the buildings as to simply demolish them. The defendant counters that disassembling a building piece by piece and the concomitant care required to not damage the structure so it remains suitable for reuse requires a minimum of 500 additional man hours. The Court is inclined to agree with the defendant. The plaintiff testified that the structure would have to be disassembled as opposed to simply demolished. Moreover, the plaintiff planned to cut the roof into a number of separate panels, number each panel, then hoist them in pieces to the ground for hauling. It is inconceivable to the Court that this process would require no more time than simply demolishing the structure. The defendant offered credible proof that a minimum of 500 additional man hours was required, and the Court accepts this estimate. Obviously, since the plaintiff argued that no additional man hours were required for this task, it has not proffered any estimates for the labor rates. The defendant, however, estimates that the costs for labor and equipment were in the range of $75 per hour. These costs seem reasonable, and the Court will accept them. As such, the Court determines that Krygoski would have incurred additional costs of $37,500 in disassembling the Composite and Assembly buildings.

Finally, the plaintiff proffered as its costs $94,734.40 to reconstruct the Composite building at the landfill and $25,467.70 to reconstruct the Assembly building at the

marina for total reconstruction costs of $120,202.10. The defendant has not challenged this assessment, and the Court will accept these estimates as the actual costs to reconstruct the two buildings at their respective sites. The total costs to the plaintiff, then, to disassemble the buildings and to reconstruct them is $157,702.10.

This analysis yields a total award of damages to the plaintiff for the lost net value of the Assembly and Composite buildings of $57,315.51.

CONCLUSION

For the reasons stated above, the Court finds in favor of the plaintiff as to the damage claims presented to this Court during trial. Accordingly, the Court awards damages in the amounts of: (1) $11,646.74 for anticipated profits from the removal and disposal of contaminated soil located beneath underground fuel storage tanks located at the Raco site; (2) $16,807.80 in anticipated profits from the removal and salvaging of 40,430 gallons of petroleum-based liquids located in underground fuel storage tanks; and (3) $57,315.51 in lost replacement value due to Krygoski's inability to reuse the Assembly and Composite buildings located at the Raco site. These three amounts total $85,770.05.

In addition, as already discussed, the parties had earlier entered into a Joint Stipulation filed on April 29, 1994, in which they had agreed on the remaining damage amounts. The parties stipulated that if Krygoski would have been allowed to perform the contract, the Government would have paid to Krygoski the following amounts (*revenue*):

Asbestos abatement	$1,264,873.50
Demolition	260,940.00
Underground tank excavation/backfill	67,466.0

Additional fill work	47,234.0
Missile silo fill work	28,000.0
Topsoil, seeding, and mulching work	27,300.0
Total	$1,695,813.50

The parties further stipulated the Krygoski would have incurred the following *costs* if it had performed the above-described contract work:

Asbestos abatement	$215,128.50
Cory Laboratories	45,840.50
Direct Labor	39,073.63
Other direct costs	127,489.92
General and accounting costs	5,000.00
Total	$432,532.55

Accordingly, the parties have stipulated to damages owed to the plaintiff of $1,263,280.95.

Moreover, the parties also stipulated that Krygoski would have earned $27,825 in salvage value for tanks, rebar, and scrap. Also, on September 15, 1994, the parties reached a stipulated agreement regarding Krygoski's claim for delay costs in the amount of $38,000. Finally, the parties reached a stipulated agreement that the pre-litigation termination costs pursuant to the FAR 31.205-42(g) (48 C.F.R.) due the plaintiff was $41,975.25. These three additional amounts due the plaintiff by stipulation of the parties total $107,800.25.

In final summary, the combination of the parties' stipulated agreements and this Court's decision with respect to the three remaining damage claims result in a total damage award of $1,456,851.20 for the plaintiff. The plaintiff is also entitled to interest pursuant to the

Contract Disputes Act of 1978 from July 28, 1988, until the time of payment.

The Clerk of the Court is directed to enter judgment awarding damages in accordance with this opinion.

Costs to the plaintiff.

United States Court of Appeals for the Federal Circuit

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on November 14, 1996.

FOR THE COURT,
MELVIN L. HALPERN, ACTING CLERK

Dated: November 7, 1996

By /s/
Brian P. LeDuc
Associate Chief Deputy Clerk

cc: SHERYL L. FLOYD
H. ROBERT SHOWERS
Wilsie H. Adams, Jr.
KRYGOSKI CONSTRUCTION CO INC V US, 95-5136
(CFC - 214-89C)

FILED
U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT
NOV - 7 1996

CLERK

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* Note: Pursuant to Fed. Cir. R. 47.6, *
* this order is not citable as precedent. *
* It is a public record. *

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48 C.F.R. § 49.501 (1996)

49.501 General.

This subpart prescribes the principal contract termination clauses. For contracts for the acquisition of commercial items, this part provides administrative guidance which may be followed when it is consistent with the requirements and procedures in the clause at 52.212-4, Contract Terms and Conditions—Commercial Items. In appropriate cases, agencies may authorize the use of special purpose clauses, if consistent with this chapter.

48 C.F.R. § 49.502 (1996)

49.502 Termination for convenience of the Government.

(a) *Fixed-price contracts of $100,000 or less (short form).*

(1) General use. The contracting officer shall insert the clause at 52.249-1, Termination for Convenience of the Government (Fixed-Price) (Short Form), in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to be $100,000 or less, except (i) if use of the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form) is appropriate, (ii) in contracts for research and development work with an educational or nonprofit institution on a no-profit basis, (iii) in contracts for architect-engineer services, or (iv) if one of the clauses prescribed or cited at 49.505(a), (b), or (e), is appropriate.

(2) *Dismantling and demolition.* If the contract is for dismantling, demolition, or removal of improvements, the contracting officer shall use the clause with its Alternate I.

(b) *Fixed-price contracts over $100,000.*

(1)(i) *General use.* The contracting officer shall insert the clause at 52.249- 2, Termination for Convenience of the Government (Fixed-Price), in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to be over $100,000, except in contracts for (i) dismantling and demolition, (ii) research and development work with an educational or nonprofit institution on a no-profit basis, or (iii) architect- engineer services; it shall not be used if the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form), is appropriate (see 49.502(c)), or one of the clauses prescribed or cited at 49.505(a), (b), or (e), is appropriate.

(ii) *Construction.* If the contract is for construction, the contracting officer shall use the clause with its Alternate I.

(iii) *Partial payments.* If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its Alternate II. In such contracts for construction, the contracting officer shall use the clause with its Alternate III.

(2) *Dismantling and demolition.* The contracting officer shall insert the clause at 52.249-3, Termination for Convenience of the Government (Dismantling, Demolition, or Removal of Improvements) in solicitations and contracts for dismantling, demolition, or removal of improvements, when a fixed-price contract is contemplated and the contract amount is expected to be over $100,000. If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer deter-

mines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its Alternate I.

(c) *Service contracts (short form).* The contracting officer shall insert the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form), in solicitations and contracts for services, regardless of value, when a fixed-price contract is contemplated and the contracting officer determines that because of the kind of services required, the successful offeror will not incur substantial charges in preparation for and in carrying out the contract, and would, if terminated for the convenience of the Government, limit termination settlement charges to services rendered before the date of termination. Examples of services where this clause may be appropriate are contracts for rental of unreserved parking space, laundry and drycleaning, etc.

(d) *Research and development contracts.* The contracting officer shall insert the clause at 52.249-5, Termination for the Convenience of the Government (Educational and Other Nonprofit Institutions), in solicitations and contracts when either a fixed-price or cost-reimbursement contract is contemplated for research and development work with an educational or nonprofit institution on a no-profit or no-fee basis.

(e) *Subcontracts.* (1) *General use.* The prime contractor may find the clause at 52.249-1, Termination for Convenience of the Government (Fixed-Price) (Short Form), or at 52.249-2, Termination for Convenience of the Government (Fixed-Price), as appropriate, suitable for use in fixed-price subcontracts, except as noted in subparagraph (2) below; *provided*, that the relationship between the contractor and subcontractor is clearly indicated. Inapplicable conditions (e.g., paragraph (d)) in 52.249-2 should be deleted and the periods reduced for submitting the subcontractor's termination settlement

proposal (e.g., 6 months), and for requesting an equitable price adjustment (e.g., 45 days).

(2) *Research and development.* The prime contractor may find the clause at 52.249-5, Termination for the Convenience of the Government (Educational and Other Nonprofit Institutions), suitable for use in subcontracts placed with educational or nonprofit institutions on a no-profit or no-fee basis; *provided*, that the relationship between the contractor and subcontractor is clearly indicated. Inapplicable conditions (e.g., paragraph (h)) should be deleted, the period for submitting the subcontractor's termination settlement proposal should be reduced (e.g., 6 months), the subcontract should be placed on a no-profit or no-fee basis, and the subcontract should incorporate or be negotiated on the basis of the cost principles in part 31 of the Federal Acquisition Regulation.

48 C.F.R. § 52.249-2 (1996), as amended

52.249-2 Termination for Convenience of the Government (Fixed-Price).

As prescribed in 49.502(b)(1)(i), insert the following clause:

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SEP 1996)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

(b) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the

Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

(1) Stop work as specified in the notice.

(2) Place no further subcontracts or orders (referred to as subcontracts in this clause) for materials, services, or facilities, except as necessary to complete the continued portion of the contract.

(3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to the Government, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case the Government shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

(5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts; the approval or ratification will be final for purposes of this clause.

(6) As directed by the Contracting Officer, transfer title and deliver to the Government (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated, and (ii) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to the Government.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that

is in the possession of the Contractor and in which the Government has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, any property of the types referred to in subparagraph (b)(6) of this clause; provided, however, that the Contractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Government under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

(c) The Contractor shall submit complete termination inventory schedules no later than 120 days from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 120-day period.

(d) After expiration of the plant clearance period as defined in Subpart 45.6 of the Federal Acquisition Regulation, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request the Government to remove those items or enter into an agreement for their storage. Within 15 days, the Government will accept title to those items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

(e) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed

by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(f) Subject to paragraph (e) of this clause, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid or remaining to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. However, the agreed amount, whether under this paragraph (f) or paragraph (g) of this clause, exclusive of costs shown in subparagraph (g)(3) of this clause, may not exceed the total contract price as reduced by (1) the amount of payments previously made and (2) the contract price of work not terminated. The contract shall be modified, and the Contractor paid the agreed amount. Paragraph (g) of this clause shall not limit, restrict, or affect the amount that may be agreed upon to be paid under this paragraph.

(g) If the Contractor and the Contracting Officer fail to agree on the whole amount to be paid because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined by the Contracting Officer as follows, but without duplication of any amounts agreed on under paragraph (f) of this clause:

(1) The contract price for completed supplies or serv-

ices accepted by the Government (or sold or acquired under subparagraph (b)(9) of this clause) not previously paid for, adjusted for any saving of freight and other charges.

(2) The total of—

(i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but excluding any costs attributable to supplies or services paid or to be paid under subparagraph (g)(1) of this clause;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(2)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(2)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(3) The reasonable costs of settlement of the work terminated, including—

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

(h) Except for normal spoilage, and except to the extent that the Government expressly assumed the risk of loss, the Contracting Officer shall exclude from the amounts payable to the Contractor under paragraph (g) of this clause, the fair value, as determined by the Contracting Officer, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government or to a buyer.

(i) The cost principles and procedures of Part 31 of the Federal Acquisition Regulation, in effect on the date of this contract, shall govern all costs claimed, agreed to, or determined under this clause.

(j) The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under paragraph (e), (g), or (l) of this clause, except that if the Contractor failed to submit the termination settlement proposal or request for equitable adjustment within the time provided in paragraph (e) or (l), respectively, and failed to request a time extension, there is no right of appeal.

(k) In arriving at the amount due the Contractor under this clause, there shall be deducted—

(1) All unliquidated advance or other payments to the Contractor under the terminated portion of this contract;

(2) Any claim which the Government has against the Contractor under this contract; and

(3) The agreed price for, or the proceeds of sale of, materials, supplies, or other things acquired by the Contractor or sold under the provisions of this clause and not recovered by or credited to the Government.

(l) If the termination is partial, the Contractor may file a proposal with the Contracting Officer for an equitable adjustment of the price(s) of the continued portion of the contract. The Contracting Officer shall make any

equitable adjustment agreed upon. Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination unless extended in writing by the Contracting Officer.

(m)(1) The Government may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Contractor for the terminated portion of the contract, if the Contracting Officer believes the total of these payments will not exceed the amount to which the Contractor will be entitled.

(2) If the total payments exceed the amount finally determined to be due, the Contractor shall repay the excess to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Contractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Contractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contracting Officer because of the circumstances.

(n) Unless otherwise provided in this contract or by statute, the Contractor shall maintain all records and documents relating to the terminated portion of this contract for 3 years after final settlement. This includes all books and other evidence bearing on the Contractor's costs and expenses under this contract. The Contractor shall make these records and documents available to the Government, at the Contractor's office, at all reasonable times, without any direct charge. If approved by the Contracting Officer, photographs, microphotographs, or

other authentic reproductions may be maintained instead of original records and documents.

(End of clause)

Alternate I (SEP 1996). If the contract is for construction, substitute the following paragraph (g) for paragraph (g) of the basic clause:

(g) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (f) of this clause:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of—

(i) The cost of this work;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(1)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(1)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including—

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

Alternate II (SEP 1996). If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the Contracting Officer determines that the requirement to pay interest on excess partial payments is inappropriate, delete subparagraph (m)(2) of the basic clause.

Alternate III (SEP 1996). If the contract is for construction and with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, substitute the following (g) for paragraph (g) of the basic clause. Subparagraph (m)(2) may be deleted from the basic clause if the Contracting Officer determines that the requirement to pay interest on excess partial payments is inappropriate.

(g) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (f) of this clause:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of—

(i) The cost of this work;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that

are properly chargeable to the terminated portion of the contract if not included in subdivision (g)(1)(i) of this clause; and

(iii) A sum, as profit on subdivision (g)(1)(i) of this clause, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including—

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

(Reported at: 681 F.2d 756)

Ronald A. Torncello and Soledad Enterprises, Inc.

v.

The United States

No. 486-80C

United States Court of Claims

June 16, 1982

Before Friedman, Chief Judge, and Davis, Nichols, Kashiwa, Bennett and Smith, Judges, en banc.*

Bennett, Judge:

This is a government contract case, before us on motions for summary judgment. At issue is the government's diversion of business away from a party, with whom it had executed a requirements contract, to a competing bidder on the original solicitation. The government defends that this diversion was justified by the constructive application to its actions of the standard "termination for the convenience of the government" clause in federal procurement. For several simple and compelling reasons, involving basic tenets of contract law, we hold that the termination for convenience clause does not apply in the situation here and find the government in breach.

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* This case came originally before a panel consisting of Chief Judge Friedman and Judges Kunzig and Bennett. Judge Kunzig died on February 21, 1982. Since that time and because of the exceptional importance of the legal issues involved, the court has ordered, pursuant to Rule 7(b), that the case be considered en banc upon the original briefs and upon supplemental briefs, but without further oral argument.

Plaintiff was the president of Soledad Enterprises, Inc. (Soledad), a California corporation that is now bankrupt. Plaintiff has succeeded to all of the rights and entitlements of Soledad with respect to the claim in this suit.

On May 31, 1973, Soledad bid for a grounds maintenance and refuse removal contract to service six Navy family housing projects in the San Diego, California area. The bid solicitation listed 12 types of work to be done under the contract, some of which were to be performed routinely and others only on a "call" basis, and the solicitation specifically provided that "Bids are solicited and award will be made on an all or none basis."

Soledad was awarded this 12-item contract, N62474-73-C-3195, on June 6, 1973. The contract term was one year, running from July 1, and it was extended in June of the next year for another year.

The present dispute concerns item 8 of the original bid, paragraph 4A.17 of the contract. This was a call item:

> PLANT DISEASE, INSECT AND RODENT CONTROL. The work shall include the control of agricultural pests, including rodents, weed control, and plant diseases which attack shrubbery, trees and turf grasses. Work authorizations for rodent and pest control will be issued by the Housing Project Managers in accordance with Paragraph 3A.7. The Contractor shall comply with the current code and rules and regulations of the San Diego County Agricultural Department.

Soledad's bid itemization, accepted by the government, specified a per call charge of $500 for any call under the pest control item. This was a high price for common pest control work but was warranted in Soledad's view by the open-ended phrasing of the item, that Soledad could be called in for potentially expensive tasks.

It turned out, however, that the Navy only needed gopher control at the housing projects, work that was customarily much cheaper than $500 per call. For this reason, the Navy did not call Soledad under item 8. Soledad realized by August 1973 that it was receiving no item 8 requests and, when it discovered the Navy's reason therefor, Soledad offered in writing to do special gopher control calls for only $35 per call. The Navy still did not request such work from Soledad, however, but called the Department of Navy Public Works, a competing bidder on the original solicitation which had submitted an item 8 figure that was less than Soledad's.

By letter of April 9, 1975, plaintiff took back its offer of $35 per call:

> Please be advised that the offer * * * is hereby rescinded. This action is being taken as there was no "Amendment of Solicitation/Modification of Contract" prepared and signed by the government or Soledad Enterprises, Inc. Furthermore, we have reason to believe that the services contracted for in item 8 has [*sic*] been given to the public works department.

Soledad's bankruptcy followed soon thereafter.

It is stipulated that Soledad never received pest control work under item 8, either under the original contract or under its renewal, at $500 per call or at $35 per call, and it is further stipulated that the Navy did have such work which it gave to Public Works. Soledad's claim is that its agreement with the Navy was for all of the Navy's requirements under the contract and that the Navy breached the contract when it diverted the work under item 8. Soledad claims that it was entitled to service all of the Navy's pest control needs and protests the fact that it got none.

I

Soledad lost its claim before the contracting officer and lost its appeal to the Armed Services Board of Contract Appeals (ASBCA). Although the ASBCA cursorily accepted that the government may have committed a breach, it viewed that issue as unimportant because of the overriding availability to the government of constructive termination for convenience. In full, the ASBCA's argument reads:

> It is the appellant's position that this contract was a requirements contract under which the Government was obligated to procure all of the services it required of the type covered by the contract, from the contractor. The appellant claims that the Government failed to order all of those services and that as a result the appellant suffered substantial financial difficulty which led to the eventual default of this and other contracts. In a similar situation the Court of Claims found it unnecessary to resolve the question of whether or not the contract was a requirements contract. *Charles R. Nesbitt v. United States*, 170 Ct. Cl. 666 (1965), *cert. denied*, 383 U.S. 926 (1966). In order to reach our decision, we assume, without finding, that the representations made by the appellant with regard to its interpretation of the bidding provisions and the subsequent contract were correct. When the Government fails to comply with its contractual obligations under the type of circumstance present here, the contractor is entitled to recover as if the contract had been terminated pursuant to the termination for the convenience provisions of the contract. *Charles R. Nesbitt v. United States*, *supra*; *G. C. Casebolt Company v. United States*, 190 Ct. Cl. 783 (1970). This contract included what is commonly referred to as a short form termination for the convenience clause which provided that to the extent the contract

> was for services, the Government was liable only for payment of those services rendered prior to the effective date of termination. In this instance the appellant has established that the Government ordered no services in connection with pest control. Since no pest control services were ordered, under the contract's termination for convenience of the Government provisions, the appellant is not entitled to any additional compensation.

Appeal of Soledad Enterprises, Inc., ASBCA Nos. 20376, 20423 to 20426, 77-2 BCA ¶ 12,552 at No. 20425 (April 29, 1977).

We must digress for a moment to explain termination for convenience and its constructive application. Direct convenience termination is provided for in the clause in plaintiff's contract referred to by the ASBCA, and it is a standard term in federal procurement:

> TERMINATION FOR CONVENIENCE OF THE GOVERNMENT
>
> The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the best interest of the Government. If this contract is for supplies and is so terminated, the Contractor shall be compensated in accordance with ASPR Section VIII, in effect on this contract's date. To the extent that this contract is for services and is so terminated, the Government shall be liable only for payment in accordance with the payment provisions of this contract for services rendered prior to the effective date of termination.

The clause is intended to enable the contracting officer to stop or curtail a contractor's performance without involving the government in a breach that would render it liable for the contractor's anticipatory profits. Constructive resort to the clause, as was had by the

ASBCA in this case, occurs in situations in which the government has stopped or curtailed a contractor's performance for reasons that turn out to be questionable or invalid. Constructively, the clause can justify the government's actions, avoid breach and limit liability. This springs from a decision of the Supreme Court that actions by a contracting party may be supported at a later date by any reason that could have been advanced at the time of the actions, even though the party was not then aware of it. *College Point Boat Corp. v. United States*, 267 U.S. 12 (1925).

Returning to the case before us, the ASBCA's implicit conclusion that the Navy could, by invoking the clause, have had a convenience termination of plaintiff's pest control services at the time that it diverted that work to Public Works, allowed the ASBCA to justify the Navy's diversion constructively, at the time of litigation. And since the Navy had never turned to Soledad for such services, there were no incurred charges to pay off.

On appeal to this court, plaintiff's basic complaint is that the practical effect of this decision of the ASBCA is to exculpate the government completely. The government was allowed to walk away from plaintiff's contract with impunity. Plaintiff contends: (1) that the requirements aspect of its contract required that it receive 100 percent of defendant's pest control business, not 0 percent as it happened, and (2) that the doctrine of constructive termination for convenience should not be allowed to render this requirement meaningless. Defendant responds: (1) that the contract actually was of the indefinite quantities type, allowing the Navy to order a null amount, and (2) even if the contract was for requirements, that constructive termination is available as a valid excuse for non-performance nevertheless.

The primary issue in this appeal, raised squarely by the facts before us, is the coverage of the government's

termination for convenience clause. The ASBCA did not question but that it was available to the government but we note that *Nesbitt v. United States*, 345 F.2d 583 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 926 (1966), on which the ASBCA placed its principal reliance, was a very different case. *Nesbitt* involved the government's dilemma with a contractor who had agreed to service the government's needs but then, after the contract award, refused to meet them. *Id.* at 586 n.3. It is far from clear that this court's recognition that the government may terminate for convenience in such a circumstance should be extended to the present facts, where termination was invoked to take advantage of a price that the government had known about at the award date and where the contractor, Soledad, remained at all times ready and willing to perform as per its agreement. Further, plaintiff's complaint is serious that the effect of the ASBCA's constructive use of termination for convenience has been to allow the government to walk away from all of its contractual obligations. We note as one of the most elementary propositions of contract law that a party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void, and we question if the government's termination for convenience clause should be construed that broadly. Since these issues are of great importance in the field of government contracts, they will receive close attention.

Before reaching these questions, however, it is necessary to address several preliminary issues.

II

A contention of the government that would forestall any further argument is its assertion that its contract with Soledad was not of the requirements type but was only for an indefinite quantity of pest control. Thus, defendant alleges, the Navy's diversion of work to Public Works was allowed by the contract. This would mean

that there was no breach, and it would render unnecessary any consideration of the ASBCA's resort to constructive termination for convenience to justify the diversion.

The ASBCA made no ruling on the type of contract that it had before it, and so this court must make the determination as an original matter. In so doing, however, we bear several important principles in mind. First, we recognize that we sit, for Wunderlich Act cases, as a court of limited review and are bound by the standards set out in the Act. 41 U.S.C. §§ 321 and 322. Thus we feel constrained to make no determination as an original matter that we could not make as a court of review in a case that properly presented the issue. Therefore, in determining whether the contract between Soledad and the Navy was for requirements or for an indefinite quantity, we will restrict our attention only to (1) the text of the contract itself, for contract construction is a matter of law that is always within our power, and (2) facts that are so well supported by the record that contrary findings would not be supportable. As we have said:

> [W]here the evidence is disputed but it is of such a nature that * * * the Board could have made only one finding of fact, it would seem that this court can make that finding without sending the matter back to the Board for determination of the factual issues; otherwise, litigation would be protracted and unnecessary delay and expense would result simply in order to have the Board formally decide a fact which legally can be decided in only one way.

Maxwell Dynamometer Co. v. United States, 386 F.2d 855, 870 (Ct. Cl. 1967); *Koppers Co. v. United States*, 405 F.2d 554 (Ct. Cl. 1968); *Dittmore-Freimuth Corp. v. United States*, 390 F.2d 664 (Ct. Cl. 1968). The second major principle is that we assume that the parties intended that a binding contract be formed. Thus, any

choice of alternative interpretations, with one interpretation saving the contract and the other voiding it, should be resolved in favor of the interpretation that saves the contract. *Arizona v. United States*, 575 F.2d 855 (Ct. Cl. 1978), and cases cited therein; *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972 (Ct. Cl. 1965), and cases cited therein.

The only pertinent terms[1] are the item from the bid solicitation, which specified "Item 8—Unit price per work authorization for rodent and pest control in accordance with the specifications, based on an estimated one work authorization per month," and the entry on plaintiff's bid response, filed on the appropriate standard form, which acknowledged the estimate, the call basis of each order and which fixed the price per call at $500. Our question is whether it is implicit in these terms, or in the circumstances surrounding the formation of the contract, that the Navy promised to give all of its work authorizations to Soledad or whether the Navy could use other contractors, too.

Looking just at the contract terms, we note that they must fit into one of the three possible types of supply contracts: those for a definite quantity, those for an indefinite quantity and those for requirements. *Mason v.*

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[1] These are the specific references to the one item of the 12-item contract that is under dispute. Separate evaluation of the parties' relationships for various of the items is warranted by the very discrete natures of the tasks and by the different bases on which those tasks were to be performed. "Two performances promised by [one party] may be paired separately with two considerations promised in return, each performance being the full agreed equivalent of one of the stated considerations; and they may be so separate in character that we have two separate sets of reciprocal rights and duties, created by a single contract." 3A Corbin on Contracts § 696 (1963).

United States, 615 F.2d 1343, 1347 (Ct. Cl. 1980). With contracts for a definite quantity, the promises and obligations flowing from each party to the other define both the minimum and maximum performances of each and furnish the consideration from each party that courts require for enforceability. With indefinite quantities contracts, however, the buyer's promise specifically is uncertain, and such a contract would fail for lack of consideration if it did not contain a minimum quantity term. *Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (1923); *Mason*, 615 F.2d at 1346 n.5; Gavin, *Government Requirements Contracts*, 5 Pub. Cont. L.J. 234, 240-44 (1972) [hereinafter *Gavin*]. Without an obligatory minimum quantity, the buyer would be allowed to order nothing, rendering its obligations illusory and, therefore, unenforceable. Requirements contracts also lack a promise from the buyer to order a specific amount, but consideration is furnished, nevertheless, by the buyer's promise to turn to the seller for all such requirements as do develop. Such contracts clearly are enforceable on that basis. *Brawley v. United States*, 96 U.S. 168, 172 (1878); *Shader Contractors, Inc. v. United States*, 276 F.2d 1, 4-6 (Ct. Cl. 1960); *Gavin* at 244-48. The entitlement of the seller to *all* of the buyer's requirements is the key, for if the buyer were able to turn elsewhere for some of its needs, then the contract would not be distinguishable from an indefinite quantities contract with no stated minimum, unenforceable as we have stated.

Under these principles, the contract before us is easily interpreted. We note that the Navy agreed to authorize pest control work, that plaintiff agreed to perform it and that there was an acknowledged estimate that one call would be made per month. A definite quantity certainly is not contemplated here, so the contract is not of that type. Just as certainly, the estimate is not stated in such terms as could be construed as an obligatory minimum, and so we could not hold that this contract is for an

indefinite quantity without destroying it as lacking consideration. Thus, we must and do conclude that plaintiff's contract is for the Navy's requirements.

The facts, as they plainly appear from the record before us, support this conclusion completely. From the circumstances surrounding the bid solicitation and the contract, and from the testimony and the exhibits introduced at the ASBCA trial, it is clear that the Navy wanted someone, a single contractor, to take on the comprehensive task of providing grounds maintenance and refuse removal at the six housing projects covered by the contract.[2] The Navy wanted to have to deal with only one contractor and executed a contract that was intended to obligate that one contractor for all of the tasks needed.[3]

III

Also at the outset of the discussion of this case, we must say that it is not a case merely for construing a federal regulation to see if a plaintiff has a monetary claim. Most of the cases in this court turn on specific statutes or regulations that do or do not afford plaintiffs the monetary relief they seek, and this court is cautious in such cases to examine the statutes and regulations carefully to make sure that the plaintiffs are entitled to the recovery they claim. Congress creates rights and entitlements, or waives its sovereign immunity, as it sees fit, and this court will award judgment only where the statute or

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[2] Note that the 12 items of the contract were to be awarded on an "all or none basis," *see* paragraph 3 of this opinion, evidently meaning that only one contractor was desired.

[3] We also note that the standard form that replaced the one on which plaintiff was required to submit its bid specifically states that it is for requirements.

regulation relied upon so provides, directly or by express implication. *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967). *See United States v. Testan*, 424 U.S. 392 (1976).

It is a different situation in the field of contracts, however.[4] The government contracts as does a private person, under the broad dictates of the common law. "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934); *Perry v. United States*, 294 U.S. 330 (1935). While it is true that the government has the power to abrogate common-law contract doctrines by specific legislation, *see, e.g.*, the First War Powers Act, 1941, Pub. L. No. 77-354, 55 Stat. 838 (power to the President to authorize agencies to enter into contracts "without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts," 55 Stat. 839); U.C.C. § 2-209(1), "Modification, Rescission and Waiver" (contractual modifications within Article 2 do not need consideration), the general rule must be that common-law contract doctrines limit the government's power to contract just as they limit the power of any private person. Thus, the government's entry into the field of contracts is not like its selective creation of rights and entitlements in other fields. As we have explained, statutes and regulations in other fields circumscribe a prospective plaintiff's recovery strictly. If, however, a plain-

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[4] *Eastport*'s discussion of the two general types of monetary claims in this court specifically is limited to non-contractual claims. 372 F.2d 1002, 1007 (1967). *Eastport* dealt only with claims that were statutory- or regulatory-based.

tiff's action or recovery purportedly is limited by a contractual term, that limitation will stand only if allowable under the doctrines of contract. Indeed, the Supreme Court has held as early as 1923 that the government may not, by simple contract, reserve to itself a power that exceeds that which a private person may have. *Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (government may not reserve to itself a right of non-performance without destroying the contract). And it does not matter that a contract term is mandated by federal procurement regulation. In the field of contracts, it is only by specific legislation that the government may trespass the bounds of general contract doctrines. Therefore, this court will read the termination for convenience clause in the contract in this case as it would read any contract term and give effect to it or deny effect to it as dictated by the general law.

IV

The coverage of the government's termination for convenience clause is now squarely at issue. Since we have concluded that the Navy indeed was obligated to give all of its pest control requirements to Soledad, and since it is stipulated that the Navy gave Soledad none, we are confronted directly with the ASBCA's use of constructive termination for convenience to allow the Navy not to continue with that obligation.[5] And since the constructive use of convenience termination is directly dependent, under *College Point Boat Corp.*, upon the availability of that ground at the time of the disputed actions,

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[5] As this is a question of law, the ASBCA's determination of course is not binding on this court. 41 U.S.C. § 322 (1976). *Cf.* 41 U.S.C. § 609(b) (Supp. 1981) (analogous provision for the Contract Disputes Act of 1978).

the ultimate question that must be asked is whether, at the time that the Navy first gave pest control work to Public Works, it could have had a convenience termination of that item under the clause in Soledad's contract. If the clause could have been invoked at that time, then the ASBCA was correct and the Navy's failure to use Soledad is excused. If not, however, then plaintiff must prevail because a breach was committed.

The full background and ramifications of the ASBCA's use of convenience termination as an exculpatory clause require a discussion over several parts. As we shall explain in Part A, below, the convenience termination clause developed as a wartime concept, and it was a way for the government to avoid the continuance of contracts that the rapid changes of war, or the war's end, had made useless or senseless. *See* Nash & Cibinic, Federal Procurement Law 1104-07 (3d ed. 1980) [hereinafter *Nash & Cibinic*]. The government could halt a contractor's performance and settle with the contractor for the progress made. As such, termination for convenience functioned to allocate to the contractor the risk of losing the benefit of its full performance if full performance became unneeded. Even when termination for convenience was imported into peacetime military and civilian procurement, only 20 or 30 years ago, and receiving its almost universal application only from 1967, *Nash & Cibinic* at 1107, the basic idea remained constant that convenience termination was an allocation of the risk of changed conditions. A long line of cases in this court bears this out. Part B of this section will examine convenience termination in the absence of changed conditions, for purely exculpatory purposes. This is the latest devel-

opment, dating only from 1974,[6] and it is this use of the clause that the government presses in the case before us. As we shall explain fully, such a use is not supported by the legal theory underlying the clause nor by the clause's history, and it has caused great concern among commentators and members of the bar. While it is plain that parties to a contract may freely agree to various forms of risk allocation, as with the basic use of the termination for convenience clause, it is just as clear that parties may not agree that one or both may walk away from all obligations without rendering the contract unenforceable. Part C explores this last point, that the availability of convenience termination for free exculpation cuts straight to whether the government's promises can be made to bind it. The question is whether a broad construction of the termination for convenience clause would make the government's promises only illusory.

For the purposes of this entire section, we will apply part of what we said at the beginning of the last section, that we will not construe the termination for convenience clause in such a way that any contract that contains it is overpowered if there is an alternative reading of the clause that allows such contracts to be upheld.

A. *The History of the Termination for Convenience Clause*

The concept that the government may, under certain circumstances, terminate a contract and settle with the contractor for the part performed dates from the winding down of military procurement after the Civil War. It originated in the reasonable recognition that continuing with wartime contracts after the war was over clearly

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[6] *Colonial Metals Co. v. United States*, 494 F.2d 1355 (Ct. Cl. 1974).

was against the public interest. Where the circumstances of the contract had changed so dramatically, the government had to have the power to halt the contractor's performance and settle.

The case that first articulated this idea, and which generally is credited as providing the basic legal theory to support the modern termination for convenience clause, is *United States v. Corliss Steam-Engine Co.*, 91 U.S. 321 (1876). *See Nash & Cibinic* at 1104; Moss & Gantt, A Steam Engine and Contract Termination Settlement Procedures, 8 Pub. Cont. L.J. 188 (1976). In *Corliss*, the government appealed a judgment of this court[7] upholding a settlement agreement between the Navy and Corliss concerning two contracts that remained uncompleted when the Civil War ended. It was the government's position on appeal, as it had been in this court, that the Navy did not have the power to bind the United States to a settlement. Indeed, Congress had passed legislation that money was not to be appropriated to pay Corliss until there was an investigation into the agreement to see if the amount could be reduced. The Supreme Court affirmed, however, holding that the Secretary of the Navy necessarily had the power to settle with contractors when the exigencies of war, or its termination, demanded. It said:

> Contracts for the armament and equipment of vessels of war may, and generally do, require numerous modifications in the progress of the work, where that work requires years for its completion. With the improvements constantly made in ship-building and steam-machinery and in arms, some parts originally

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[7] Reported in 10 Ct. Cl. 494 (1874).

> contracted for may have to be abandoned, and other parts substituted; and it would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors.

91 U.S. at 323. Clearly, *Corliss* establishes as basic law and policy that procuring agencies must have the power to settle contracts that have been subjected to great changes in expectations.

During World War I, the *Corliss* doctrine expanded into a very important part of military procurement. Included here are two examples of this expansion, a statute and a contract clause, each plainly reflecting the idea expressed by the Supreme Court in *Corliss* that the government must be able to settle with contractors when the circumstances of war require. In 1917, Congress passed the Urgent Deficiency Appropriation Act, Pub. L. No. 65-23, 40 Stat. 182, responding to a two-pronged concern that the government not have to remain committed for obsolete items during the war or for stockpiles of items at the war's end. vom Baur, Fifty Years of Government Contract Law, 29 Fed. B.J. 305, 313 (1970). The Act authorized the President, until 6 months after a final treaty of peace, 40 Stat. 183, "[t]o modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material." 40 Stat. 182. In such case, the government was to make "just compensation therefor." 40 Stat. 183. The example of a specially drafted contract clause is from *Davis Sewing Machine Co. v. United States*, 60 Ct. Cl. 201 (1925), *aff'd*, 273 U.S. 324 (1927). *Davis Sewing Machine* involved a contract for the procurement of Very pistols, which provided:

> *Termination*—This contract being necessitated by a state of war now existing, it is desirable and expedient that provision be made for its cancellation upon fair and equitable terms in the event of the termination or limitation of the war, or if in anticipation thereof or because of changes in methods of warfare the Chief of Ordnance should be of the opinion that the completion of this contract has become unnecessary. It is therefore provided that any time, and from time to time, during the currency of this contract, the Chief of Ordnance may for any of the causes above stated notify the contractor that any part or parts of the articles then remaining undelivered shall not be manufactured or delivered.

Id. at 203. As with the Urgent Deficiency Appropriation Act, this contract provided that the government would settle with the contractor, specifically for accrued costs and just compensation. *Id.* It is important that both of these examples make clear that convenience termination, as it was developing, was intended just to handle changed conditions, relieving the government of the risk of receiving obsolete or useless goods. The risk was shifted to the contractor that it could lose the full benefit of its expectations if circumstances changed too radically.

For World War II, the *Corliss* concept was embodied in a mandatory termination clause for fixed-price supply contracts, the direct predecessor of the modern termination for convenience clause:

> *Termination for the convenience of the Government.* (a) The Government may, at any time, terminate this contract, in whole or in part by a notice in writing from the Contracting Officer to the Contractor that the contract is terminated under this Article.

10 C.F.R. § 81.324 (Cum. Supp. 1938-43). Also provided for is payment to the contractor of accrued costs and a reasonable portion of anticipated profit. *Id.* It will be noted immediately that this clause seems to be worded for very broad availability. The power to terminate "at any time * * * in whole or in part" is much broader, for example, than the conditions recited in the World War I clause quoted above. It must be understood, however, that its use was restricted to the war period, *Nash & Cibinic* at 1106, and clearly was a response to wartime emergency conditions. Despite the broad wording, the World War II clause still was to allocate the risk of changed circumstances. As Congress said, when it enacted the Contract Settlement Act of 1944, Pub. L. No. 78-395, 58 Stat. 649, to provide an administrative structure for winding down World War II procurement, the main objectives of settlement procedures were "to facilitate maximum war production during the war, and to expedite reconversion from war production to civilian production as war conditions permit (and) to assure to prime contractors and subcontractors, small and large, speedy and equitable final settlement of claims under terminated war contracts * * *." *Id.* Contractors risked losing the benefits of full performance but only for the exigencies of war.

The next major steps in the development of termination for convenience occurred in 1950, when the concept first was applied to peacetime military procurement, and in 1967, when it first was given the general applicability to peacetime military and civilian procurement that it has today. *Nash & Cibinic* at 1107. It can readily be understood that these were very significant shifts, entailing a great potential for difficulty in adapting the concept to new settings. The modern formulation of the clause uses the same broad language that was used in World War II (see section I of this opinion for the clause that is in dispute in this case) but there was, and is, not the same

kind of emergency situation. From the *Corliss* decision in 1876 to the last use of the World War II convenience termination clause in early 1944, the legal basis of the government's power had always been that the great and unpredictable circumstances of war necessitated some ability to halt useless contracts and settle with the contractors. War was now absent.

The response in this court was to rely on the risk allocation nature of the concept and to allow termination for convenience only when the expectations of the parties had been subjected to a substantial change. The contractor risked losing the full benefit of his performance if something occurred, apart from the bargain and the expectations of the parties, that made continuance of the contract clearly inadvisable. The history of cases in this court demonstrates this. *John Reiner & Co. v. United States*, 325 F.2d 438 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964) (irregularity in the bid award); *Brown & Son Elec. Co. v. United States*, 325 F.2d 446 (Ct. Cl. 1963) (irregularity in bid award); *Nesbitt v. United States*, 345 F.2d 583 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 926 (1966) (refusal of contractor to meet requirements); *Warren Bros. Roads Co. v. United States*, 355 F.2d 612 (Ct. Cl. 1965) (irregularity in the bid award); *Coastal Cargo Co. v. United States*, 351 F.2d 1004 (Ct. Cl. 1965) (irregularity in bid award); *Schlesinger v. United States*, 390 F.2d 702 (Ct. Cl. 1968) (plaintiff under investigation by Senate for procurement irregularities, and in technical default); *Nolan Bros. v. United States*, 405 F.2d 1250 (Ct. Cl. 1969) (physical changes at site made performance impossible); *G. C. Casebolt Co. v. United States*, 421 F.2d 710 (Ct. Cl. 1970) (irregularity in the bid award).

These cases recognized that the termination for convenience clause was only to be applied where there was some change from the parties' original bargain and was not to be applied as broadly as an untutored reading of

the words might suggest. Especially, we point to *Nesbitt*, which quoted the "from time to time" wording of the clause but specified in a footnote that the plaintiff's failure to perform in that case undoubtedly was a proper circumstance for the clause's use, 345 F.2d at 585-86 and 586 n.3; to *Nolan*, which said that it was "entirely reasonable * * * (to invoke the clause for) a post-contract recognition that the job is impossible or too difficult to perform or too costly for the Government if pushed through to its conclusion," 405 F.2d at 1253; to *Casebolt*, where the court specifically recognized its obligation to see if the government's directive to terminate the contract in that case "could lawfully come under that clause," 421 F.2d at 712; and to *Reiner*, in which the court spoke in its broadest terms about the availability of the clause, that it could be used in a "host of variable and unspecified situations" and at the will of the government, and still inquired into the propriety of its use on the facts before it. 325 F.2d at 442-43. The message in those cases is clear that termination for convenience was to allocate the risk of a change in the circumstances of the bargain or in the expectations of the parties.

B. *Termination for Convenience for Exculpation*

In 1974, this court first allowed termination for convenience for a different reason than risk allocation. The case, *Colonial Metals v. United States*, 494 F.2d 1355 (1974), involved no changed conditions, only the government's decision to terminate the contractor and remake the contract with someone else, for a reason that was known or should have been known to the government *before* the contract was awarded.

Colonial Metals dealt with a supply contract for a definite quantity of copper, with a termination for convenience clause much like the one now in issue.[8] Plaintiff's bid had been higher than what would have been charged by a primary source supplier, quotations for which regularly appear in the *Wall Street Journal* and trade papers, *id.* at 1360, because plaintiff was a secondary source. The government contracted with plaintiff, nevertheless, but then decided soon after to remake the contract with primary sources. Plaintiff was terminated for convenience before any performance. Although many aspects of the government's decision-making were unclear, the court found that it was certain, "as the Board found, (that) the Government terminated to get a better price from another source, a price which the Government throughout knew or ought to have known was readily available." *Id.* at 1360.

In the *Colonial Metals* opinion, by sustaining the government's termination for convenience, this court made a clear break with all of the prior law on the subject. The requirement of changed conditions specifically was rejected:

> Termination to buy elsewhere at a cheaper price is essentially such a termination as has repeatedly been approved. The added element that the contracting of-

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[8] The clause in the *Colonial Metals* contract was incorporated by reference to ASPR 7-103.21(c) (April 1966), 32 CFR §§ 7.103-21(c), 8.701(a) (1970) (Termination for Convenience of the Government, April 1966). It provides in part as follows: "(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government."

> ficer knew of the better price elsewhere when he awarded the contract to plaintiff * * * means only that the contract was awarded improvidently and does not narrow the right to terminate. The clause is not designed to perpetuate error, but to permit its rectification.
>
> Termination for convenience is as available for contracts improvident in their origin as for contracts which supervening events show to be onerous or unprofitable for the Government.

Id. at 1361. Termination for convenience was allowed to be used as an exculpatory clause, available at the unlimited discretion of the contracting officer. The broad wording of the convenience termination clause was applied without regard to the history of emergency, wartime situations in which the words were formulated or to the legal theory of risk allocation as it has dated from *Corliss*.

The commentary on *Colonial Metals* has not been favorable. Professors Nash and Cibinic, on the part of the opinion that says that "[t]ermination to buy elsewhere at a cheaper price is essentially such a termination as has repeatedly been approved," note that there are no authorities cited and assert that there simply are none to cite, except for an unpublished Comptroller General opinion. *Nash & Cibinic* at 1112. Other commentators note that the effect of *Colonial Metals* is to put contractors "in the untenable position of being subject to termination and loss of the benefit of the sale when the market falls but being saddled with a loss when the reverse occurs." Perlman & Goodrich, *Termination for Convenience Settlements—The Government's Limited Payment for Cancellation of Contracts*, 10 Pub. Cont. L.J. 1, 6 (1978). They assert that this result is unfair, *id.*, but find it inescapable after *Colonial Metals*, because "[i]t can only be concluded that there are virtually no limitations on the

Government's right to terminate for convenience." *Id.* at 7. Another writer has gone so far as to draft a hypothetical telegram for convenience termination that begins: "Your contract with me * * * is hereby terminated because you are in default, I think; in any event you are tardy in making progress, probably. Even if neither conclusion is true, said contract is still terminated because it suits me to do so." Newman, *The Beginning of the End--The Encroachment of Federal Contract Termination Practices*, 33 Bus. Law. 2143, 2143 (1978). It is the consensus that *Colonial Metals* is a far-reaching decision of major concern, imposing an onerous burden on anyone who would deal with the government. *Nash & Cibinic* at 1105; Note, *Tying Together Termination for Convenience in Government Contracts*, 7 Pepperdine L. Rev. 711, 721-22 (1980) [hereinafter *Pepperdine*].

Colonial Metals appears to be an aberration in the precedents of the court. The case came before the court on defendant's uncontested motion to adopt the trial judge's report as the basis for its judgment. Plaintiff had lost before the trial judge but did not request review, and the motion was granted, without oral argument. The attention of the court was in no way directed, as it is now, to the fundamental issues so important in the pending case, and plaintiff's failure to raise a contest dilutes the decision of much weight as precedent that we otherwise would accord it.[9] It is clear, however, that

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[9] *Colonial Metals* has only been cited once by this court and then not for any proposition made an issue in the case we must now decide. *Kalvar Corp. v. United States*, 543 F.2d 1298 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977) (award to another contractor after termination of plaintiff's contract is insufficient to show bad faith absent proof of malice or conspiracy against plaintiff). The decision has played an important part in ASBCA decisions, however. See Note,

(Footnote cont'd on next page)

Colonial Metals marked a dramatic departure from the development of convenience termination as a method of risk allocation. It established a new reading of the clause, convenience termination for exculpation, and it is this reading that the government contends for in the case now before us. It is the only decision of this court in which a plaintiff was denied recovery after convenience termination that was based on knowledge acquired before the contract was awarded.

Were we to have only the historical argument before us, however, a decision on the breadth of the termination for convenience clause would be very difficult. *Colonial Metals* may have broken with historical development but it is, of course, within the power of contracting parties to evolve new types of agreements as long as the basic tenets of contract law are followed. As *Colonial Metals* itself put it, "[i]t may well be * * * that the Government does not promote confidence in its procurement process when it terminates a contract and deprives the contractor of the profits of the bargain, for reasons which were known at the time of the award." 494 F.2d at 1360. But this alone is not enough to say that such a power of termination cannot be had by the government. The answer to this, however, is that the historical argument is not the only one against convenience termination for exculpation. When a party seeks to restrict to itself an unlimited right to escape its promises, as termination on knowledge acquired before the contract award surely is, it risks violating one of contract law's most fundamental principles,

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Tying Together Termination for Convenience in Government Contracts, 7 Pepperdine L. Rev. 711, 721 n.56 (1980).

that all contracts must be supported by consideration. *Nash & Cibinic* at 1115.

C. *The Requirement of Consideration*

It is beyond dispute that the government must furnish consideration for its contractual promises as must any private party. The Supreme Court so held in *Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (1923), when it invalidated a contract because it lacked consideration from the government, and this court has spelled out with particularity the forms of consideration generally required from the government in using its various types of supply contracts. *Mason v. United States*, 615 F.2d 1343 (Ct. Cl. 1980). *See also* Kelly, *The Concept of Consideration in Government Contracts*, 10 JAG L. Rev. 20 (Jan.-Feb.1968).

As we explained in section II of this opinion, it is the very essence of a requirements contract, such as plaintiff had with the government in this case, that the buyer agree to turn to the supplier for all of its needs. If there is not a commitment for all needs, then the relation is not different from an indefinite quantities contract with no required minimum, the very type of relation that the Supreme Court held in *Willard, Sutherland & Co.*, could not be a contract. See section II of this opinion.

The effect of the ASBCA's decision in the case before us, however, was to allow the government not to give Soledad any of its needs, to walk away from its cardinal contractual obligation. It is hornbook law, as the government concedes in its supplemental brief, that a route of complete escape vitiates any other consideration furnished and is incompatible with the existence of a contract. A promise to buy such a quantity of goods as the buyer may thereafter order, or to take goods in such quantities "as may be desired," or as the buyer "may want" is no consideration since the buyer may refrain

from buying at his option and do so without incurring legal detriment himself or benefiting the other party. 1 S. Williston, A Treatise on the Law of Contracts § 104 (3d ed. 1957). According to Corbin:

> If what appears to be a promise is an illusion, there is no promise; like the mirage of the desert with its vision of flowing water which yet lets the traveller die of thirst, there is nothing there. By the phrase "illusory promise" is meant words in promissory form that promise nothing; they do not purport to put any limitation on the freedom of the alleged promisor, but leave his future action subject to his own future will, just as it would have been had he said no words at all.

1 Corbin on Contracts § 145 (1963). It must be concluded, then, that the government's promise to turn to Soledad for all of its pest control work, if it was also implicit in the termination for convenience clause that the government could give Soledad none, was no promise at all. The contract would thus fail.

The approach of the Restatement (Second) of Contracts is to consider all of the possible performances under a contract's terms as alternative performances, and to require that each alternative be itself a sufficient obligation to support the contract. In this way, it is ensured that each party necessarily will end up performing in a way that reflects some binding obligation. "A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless * * * each of the alternative performances would have been consideration if it alone had been bargained for * * *." Restatement (Second) of Contracts § 77 (1979). Illustrations 1 and 4 to this section resemble the instant case:

> 1. A offers to deliver to B at $2 a bushel as many bushels of wheat * * * as B may choose to order

within the next 30 days. B accepts, agreeing to buy at that price as much as he shall order from A within that time. B's acceptance involves no promise by him, and is not consideration.

4. A agrees to sell and B to buy between 400 and 600 tons of fertilizer in installments as ordered by B, A reserving the right to terminate the agreement at any time without notice. B's promise is without consideration. [Note that this illustration was taken from an old case which regarded consideration as flowing from the promisee to the promisor. B's promise is without consideration because none flowed from A due to A's right to terminate.]

The possible alternative of non-performance is unacceptable. Thus the ASBCA's view of the government's power to terminate for convenience, allowing unlimited exculpation, is too broad.

It has been argued, however, that the procedures that the government must follow when it terminates for convenience do not allow it to walk flatly away, and that the government does give consideration to the extent that it is not completely free of obligations. *Pepperdine* at 727. To use the language of the Restatement section quoted above, this is an assertion that the government's alternative performance of exculpatory convenience termination still involves promises that would be sufficient if they alone had been bargained for. This would mean that each of the government's two alternatives, performance according to the contract or termination under certain sufficient procedures, would be enough to bind the government, and the contract would not be jeopardized. Specifically, the asserted alternative measures of consideration contained in the procedures for terminating a services contract, as in this case, are: (1) an obligation to give notice of convenience termination and (2) an obligation to pay for services rendered.

On the facts of our case, however, if the ASBCA's free use of exculpatory convenience termination were allowed, these asserted obligations still could not provide an obligation sufficient to support the alternative performance of exculpatory termination. (1) On the point of notice, we need only note that convenience termination in this case was constructive, because the procedures for invoking the clause were not originally followed. There is never notice in a constructive case, and so it plainly cannot be the binding obligation that would supply consideration.[10] (2) On the point of paying for services rendered, it seems that requiring only that the government pay for how far it has gone gives the government the possibility of transforming virtually any contract into one for an indefinite quantity, with no required minimum term. We have said repeatedly in this opinion that such an arrangement fails. *Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (1923).

Thus we must conclude that none of the termination procedures entails an alternative performance that would bind the government to anything that would be sufficient for consideration if it alone had been bargained for. Termination for convenience for exculpation, then, as the ASBCA allowed in this case, if there were no restrictions on its use other than the termination procedures, would vitiate the consideration normally furnished by the government for a requirements contract without substituting

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[10] Even if given, however, as in direct convenience termination cases, we would question whether it is sufficient to support a contract merely that one party promise to the other to tell him that he is walking away before he does so. *But cf. Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642 (2d Cir. 1945) (finding consideration in an implicit requirement to notify of cancellation within a "reasonable time").

any other sufficient obligation. Such a reading of the clause would destroy the contract.

The government argues further, however, that it is a sufficient fetter on convenience termination that the contracting officer must determine in good faith that termination would be "in the best interest of the Government." Thus, the government cannot invoke the clause where it would not be in its interest to do so or where the contracting officer lacks good faith in making the determination of interest. On the first point, it seems hardly sufficient for the government to promise not to do anything that would be against its own interest. This merely is promising only to do whatever suits it. On the second, we note that the government, unlike private parties, is assumed always to act in good faith, subject only to an extremely difficult showing by the plaintiff to the contrary. *Librach v. United States*, 147 Ct. Cl. 605 (1959). As this court has phrased it, in a case specifically involving convenience termination:

> it requires "well-nigh irrefragable proof" to induce the court to abandon the presumption of good faith dealing. *Knotts v. United States*, 121 F. Supp. 630, 631 (Ct. Cl. 1954).
>
> In the cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been equated with evidence of some specific intent to injure the plaintiff. Thus, in *Gadsden v. United States*, 78 F. Supp. 126, 127 (Ct. Cl. 1948), the court compared bad faith to actions which are "motivated alone by malice." In *Knotts, supra*, at 121 F. Supp. 636, the court found bad faith in a civilian pay suit only in view of a proven "conspiracy * * * to get rid of plaintiff." Similarly, the court in *Struck Constr. Co. v. United States*, 96 Ct. Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was "designedly

> oppressive." But in *Librach*, *supra*, at 147 Ct. Cl. 614, the court found no bad faith because the officials involved were not "actuated by animus toward the plaintiff."

Kalvar Corp. v. United States, 543 F.2d 1298, 1301-02 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977). Thus, the government's obligation to act in good faith hardly functions as the meaningful obligation that it may be for private persons. Since good faith is presumed unless bad faith is shown, the government is prevented only from engaging in actions motivated by a specific intent to harm the plaintiff. It does not seem enough to support the government's claim for otherwise unlimited convenience termination for the government only to promise not to use it specifically to damage the contractor.

The government also argues, as its final assertion, that its power to terminate for convenience is subject to sufficient limitation in that it recognizes that it cannot invoke the clause when it would be a clear abuse of discretion to do so. *National Factors, Inc. v. United States*, 492 F.2d 1383 (Ct. Cl. 1974). This is an argument that the reservation of a power to "terminate within my discretion" involves an obligation sufficient to uphold a contract because discretion is limited. As soon as one wonders what those limits are, however, one realizes that this argument of the government puts the cart before the horse. Discretion, and its abuses, are concepts that depend for their very meanings on the existence of other limits. Discretionary matters are those about which the party having discretion may be flexible, within an otherwise legal agreement, and abuse occurs in the rare situations when something arises that seems to make that normal action unfair. As concepts that only exist *within* limits, they cannot *be* the limits, as the argument of the government suggests. If the government is correct that its power to terminate for convenience is unlimited

except that its exercise cannot be an abuse of discretion, how could such an abuse ever take place? What limits are there to abuse? Abuse of discretion is a valuable doctrine to enable otherwise legal actions to be overturned if there seems some clear wrong nevertheless, but it is not applicable to actions that simply are not legal at all. It is bootstrapping to say that the government's claimed power of unlimited exculpation is saved by the limits on its discretion. Those limits must be derived from something else, but under the government's view there is nothing else.

In the last analysis, then, if the ASBCA's free use of convenience termination is adopted, the asserted restrictions on the government's termination power still would not provide an obligation that would satisfy the government's requirement of furnishing consideration. There are no sufficient termination procedures: (1) notice is not given in a constructive case and (2) paying for services rendered would result only in converting all contracts that contained the clause to ones for an indefinite quantity with no stated minimum. Also, the requirement of good faith is not sufficient because the government's presumption of good faith dealing is rebuttable only in the most extreme circumstances, when there is a specific intent to harm the contractor. And the government's obligation to avoid clear abuses of discretion is only an illusion. Without any other limits, the concept of discretion is meaningless. We must conclude that free termination for convenience is not supportable.

We have said in this opinion that we will not construe a contract clause in such a way that the contract is destroyed if there is an alternate reading that will uphold the contract. Accordingly we will not read the clause as freely as did the ASBCA and we restrict the availability of the clause to situations where the circumstances of the bargain or the expectations of the parties have changed

sufficiently that the clause serves only to allocate risk. This avoids the mistake of *Colonial Metals* and restores the meaning of the clause to what it had been from 1876 until it was changed by *Colonial Metals* in 1974. Of course, if the government were to change its convenience termination procedures in such a way that valid consideration was still furnished in an exculpation situation, by limiting its power to terminate in some way that would be consideration for the contract if it alone had been bargained for, then convenience termination for exculpatory purposes would also be proper.

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It remains only to summarize what this opinion does and what it does not do. We are not holding here that the government cannot settle with contractors on those contracts that the government needs to settle. The termination for convenience clause is a valuable and important aspect of federal procurement. It has a long history and is founded solidly on *Corliss* of 1876. Nor are we holding that the government cannot draft for itself some method of exculpation so long as it also binds itself to something that will support the contract. We hold in this opinion only that the government may not use the standard termination for convenience clause to dishonor, with impunity, its contractual obligations.

In the case before us, the Navy had accepted Soledad's bid and had executed a contract knowing that another bid was lower. This contract bound the Navy to give to Soledad all of its pest control needs at the six housing projects covered. The Navy could not just walk away from this promise without making a mockery of the contract. It is nothing more than basic contract law that a power to terminate must be limited in some meaningful way, as measured by the requirement of consideration. The government has argued that there are no limits on its power to invoke termination for convenience.

However, since the government's convenience termination procedures (giving notice and paying for services rendered), at least as applied to this case, also put no sufficient limits on the government, its unrestricted use of the clause cannot be correct. Any contract containing the clause, in the absence of something else to furnish consideration, would fail for the lack of any binding obligation. Therefore, we must read the termination for convenience clause in Soledad's contract to require some kind of change from the circumstances of the bargain or in the expectations of the parties. These are just the historical limits on the use of the clause as they have developed from *Corliss*.

On the facts as found by the ASBCA, at the time that the Navy first called Public Works to do the work that it had contracted with Soledad to have done, there were no changes from the circumstances of the bargain between the Navy and Soledad, or in their expectations. The Navy had known from the competitor's bids, before it made the contract with Soledad, that Soledad's price was high and that it could get pest control more cheaply elsewhere. The Navy contracted with Soledad anyway. The ASBCA erred in allowing constructive termination for convenience to excuse the Navy's diversion of business. Termination for convenience was not available to the Navy, and so the Navy's breach of Soledad's contract is unexcused.

Defendant's motion for summary judgment is denied. Plaintiff's motion for summary judgment is granted to the extent that we find that the contract was breached by defendant. This case is referred to the trial division, for further proceedings on the issue of damages, in accordance with this opinion and Rule 131(c)(2). Defendant filed a motion on March 19, 1981, to strike an affidavit by plaintiff. In view of our conclusion that the contract as a matter of law is a requirements contract, plaintiff's affi-

davit that he so considered it is immaterial and mooted. *Colonial Metals Co. v. United States*, 494 F.2d 1355 (Ct. Cl. 1974), to the extent that it is inconsistent with this opinion, is overruled. We cannot condone termination based on knowledge of a lower cost when that knowledge preceded award of the contract.

Friedman, Chief Judge, concurring:

As I understand the court's opinion, the court holds only that when the government enters into a requirements contract, knowing that it can obtain an item the contract covers for less than the contract price and intending to do so, there cannot be a constructive termination for convenience of the government when the government follows that course. On that basis, I join in the opinion.

Davis, Judge, concurring in the result:

Although I fully concur with the end-result of Judge Bennett's opinion—that a convenience termination clause could not be properly used to end this requirements contract where the Government knew, at the time it entered into the agreement, that it could obtain a better price from another person[1]—I cannot join in much of the opinion which seems to me unnecessarily broad (reaching out toward different cases not now before us) and, on some points, incorrect. I do agree that (a) the contract was of the requirements type, (b) there is, for this case, no statute or regulation absolving this contract from the normal requirement of being supported by consideration, (c) if the convenience-termination clause is used, *in this*

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[1] This lower price is the only reason given for defendant's refusing to order pest-control services from plaintiff.

instance of pre-existing knowledge, as the defendant would do, then this requirements contract would be without proper consideration, (d) accordingly, the contract should be construed otherwise in order to sustain it as valid, and (e) *Colonial Metals Co. v. United States*, 494 F.2d 1355 (Ct. Cl. 1974), should be overruled. That is sufficient to reach the correct result, and nothing else need be said in this case.

There is, however, much else in Judge Bennett's opinion—unnecessary discussion which I cannot accept. For one thing, I do not agree at all with the suggestion that the scope of the convenience-termination clause is narrower today than during World War II. In my view, the type of emergency procurement conditions experienced in World War II can be, and not infrequently are, present in the post-war period—and the convenience-termination clause was deliberately continued into the present era for that precise reason.

Second, I do not agree that "abuse of discretion" is an inadequate or unsatisfactory general standard for gauging the contracting officer's use of the termination clause. The clause in the contract before us calls for use of the termination device only "when it is in the best interest of the Government." That is comparable to the "public interest" standard often used to control administrative rulings in the regulatory field, and is likewise parallel to the criterion by which several other procurement decisions are measured.[2] In the present instance, I would

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[2] In *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301 (Ct. Cl. 1976), *cert. denied*, 434 U.S. 830 (1977), this court expressly asked the parties, in a convenience-termination case, to discuss "bad faith or a clear abuse of discretion," and then found that that plaintiff had

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have no difficulty in holding that it was an abuse of discretion to use the clause to end the contract because lower prices could be obtained elsewhere when the contracting officer already knew that very fact before he consummated the contract with plaintiff.

Third, I do not agree that "bad faith" is as narrow as Judge Bennett says it is. In *Kalvar, supra*—the case he cites—this court said, without in any way seeking to modify our prior holdings: " * * * many of our prior decisions seem implicitly to accept the equivalence of bad faith, abuse of discretion, and gross error." 543 F.2d at 1301, note 1. *Kalvar* expressly held that that contractor had failed to show either bad faith or abuse of discretion (*see* footnote 2, *supra*) and the limited definition of bad faith quoted in the opinion gave merely one aspect of the concept of "bad faith." Here, too, I would be ready to hold that a contracting officer acted in bad faith when he terminated a contract for convenience to get a better price of which he had full knowledge (and which was available) at the time when he deliberately entered into the contract with plaintiff.

Finally, I consider it wrong and a mistake to intimate, even provisionally or gratuitously, that the convenience termination clause cannot be utilized when a better price appears *after* the contract is made. As Judge Bennett recognizes, the prime purpose of the clause is to take account of changed conditions occurring after the agreement is consummated, and a better price appearing at that time appears to be such a change in significant

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"failed to make a sufficient showing of bad faith or abuse of discretion by the Government."

conditions. Yet his opinion cites, with apparent acquiescence or approval, extra-judicial commentary suggesting that a post-contract change in the price situation should not be enough to trigger the convenience termination clause.

As I have already pointed out, all the portions of the opinion to which I object are unnecessary to the result. At very best they will prove troublesome in future cases which are not now before us.

Nichols, Judge, concurring in the result:

I concur in the result, but I think the court takes a needlessly circuitous route to a destination we all agree on. In getting there, it tosses off needlessly sweeping dicta.

As regards the doctrine of consideration, the court puts aside the other 11 items and regards the "requirements" clause for pest control if needed, as if it stood alone. I am not sure a provision for use of pest control services at the government's sole election is unsupported by consideration if other contract undertakings are not similarly avoidable on the government side. Moreover, a termination of a contract for convenience is valid only in the absence of bad faith or a clear abuse of discretion. *National Factors, Inc. v. United States*, 492 F.2d 1383 (Ct. Cl. 1974). Here we have a putative or "constructive" termination only, and the court will not suppose such a termination as exonerating defendant from all its commitments, if the act would be an abuse of discretion. If consideration is furnished, the court will not inquire into its adequacy. *Mills v. United States*, 410 F.2d 767 (Ct. Cl. 1969).

As the termination cannot be postulated if it would be an abuse of discretion, I turn to what would constitute the abuse. We need not consider cases not before the court. Here the government stated it would evaluate bids

on all the items as an entirety and make the award only to one who had bid on all items. Having promised this, it would be estopped to eliminate from the award by termination any items just because, separately considered, they were at unfavorable prices, while retaining all those bid at favorable prices. The administration of the contract must be consistent with the rules used in evaluating the bids, to which the bidders conformed in bidding.

John Cibinic, Jr., *Convenience Terminations: What Are the Limits?*, 10 *Nash & Cibinic Rep.* 147 (1996)

¶ 52 • CONVENIENCE TERMINATIONS: What Are The Limits? • As we stated in our book *Administration of Government Contracts* (3d ed. 1995) at 1077: "An unlimited Government right of termination raises serious questions as to whether the Government furnishes consideration in a contract containing a termination clause." However, the broad language of the "Termination for the Convenience of the government" clauses (e.g., Federal Acquisition Regulation 52.249-1 and -2) seems to place no limits on the Government's right to terminate, stating that the Contracting Officer can terminate the contract when it is determined to be "in the Government's interest." Thus, courts have struggled with the question of what limits should be placed on the Government's right to terminate contracts for its convenience. Early cases announced that terminations for convenience would be overturned only in the event of bad faith or an abuse of discretion on the part of the Government, e.g., *Kalvar Corp. v. U.S.*, 211 Ct. Cl. 192, 543 F.2d 1298 (1976), 18 GC ¶ 458, *cert. denied,* 434 U.S. 830 (1977). Another possible limit–allowing the Government to terminate only when the circumstances change from those in existence when the contract was formed–was announced in *Torncello v U.S.*, 231 Ct. Cl. 20, 681 F.2d 756 (1982), 24 GC ¶ 367. This "changed circumstances" concept was not universally well received, either at its inception or in the years following.

The Krygoski Decision

The most recent attack on the "changed circumstances" concept comes from a panel of the Court of Appeals for the Federal Circuit, *Krygoski Construction*

Co. v. U.S., No. 95-5136 (Fed Cir. Aug. 1, 1996), 15 FPD ¶ 88. There, the Government terminated a demolition contract for convenience because of the presence at the site of a much greater amount of asbestos-contaminated materials than was specified in the solicitation. The CO decided that the increase (estimated to be 25% to 35%) in asbestos removal needs would be a cardinal change and that it would be unfair to other bidders to amend the contract. The contractor sued in the Court of Federal Claims claiming that the termination for convenience was invalid. In unpublished decisions, the termination was held invalid and the contractor was awarded anticipated profits on finding that no change in circumstances was present. The Government appealed to the Federal Circuit which reversed the decisions, declaring that the Court of Federal Claims had made an error of law by relying on the changed circumstances concept, even though the facts of the case would have satisfied that requirement. The Federal Circuit panel stated: "Although arguably the Government's circumstances had sufficiently changed to meet even the *Torncello* plurality standard, this court declines to reach this issue because *Torncello* applies only when the Government enters a contract with no intention of fulfilling its promises." Characterizing the change of circumstances discussion in *Torncello* as *dicta*, the *Krygoski* panel announced that:

> An examination of termination for convenience law from several decades ago discloses mixed signals about limiting terminations under the bad faith/abuse of discretion standard in *Kalvar*, 543 F.2d at 1301-06, or the change of circumstances test in *Torncello*, 681 F.2d at 772. A full review of more recent case law, coupled with recent enactments, however, discloses a clear signal for implementation of termination for convenience clauses.

We're not sure that we can find the "clear signal" to which the court refers. However, we'll try. But first, we'd like to clear up some misconceptions about *Torncello*.

The *Torncello* Case

Torncello arose out of a contract for janitorial and other services awarded by the Navy to Soledad Industries, Inc. for multiple items with bids solicited and award made on an "all or none" basis. Soledad unbalanced its bid, bidding $500 per call on one of the items. An in-house bid from a Navy organization was considerably lower. Nevertheless, the entire contract was awarded to Soledad. During performance, the Navy never issued any calls to Soledad for that item, instead having all of the work performed by the Navy organization, even though Soledad had offered to reduce its price on that item. The contract was terminated for default, and one of the defenses raised by Soledad was the Government's failure to order the work. Soledad contended that it was a requirements contract, but the Navy argued that it was an indefinite quantity contract and that the Navy was not obligated to order the work from Soledad.

• *Board Of Contract Appeals Decision*—The Armed Services Board of Contract Appeals declined to rule on the matter, holding that even if it was a requirements contract, the Government could have terminated the contract for its convenience and that, therefore, the Government's failure to order work would not be a breach of contract, *Soledad Enterprises, Inc.*, ASBCA 20376, 77-2 BCA ¶ 12552, 19 GC ¶ 406. Unfortunately for Soledad, the contract included a short-form "Termination for Convenience" clause that permitted recovery only for services performed. Since the Government ordered no services, Soledad performed none and was not entitled to any recovery.

• *Court Of Claims Decision*–By the time the board's decision was appealed, Soledad was in bankruptcy and Torncello was its trustee. An *en banc* panel of six judges of the Court of Claims (the predecessor of the Court of Appeals for the Federal Circuit) participated in the decision "because of the exceptional importance of the legal issues involved." Three judges joined in what has been characterized as the "plurality opinion." The other three judges wrote individual concurring opinions, each disagreeing to some extent with the opinion of the three judges who had joined together. However, the end result was a determination that the Navy had breached the contract, and the case was remanded to the Trial Division to determine the amount of damages.

• *Plurality Opinion*–Judges Bennett, Kashiwa, and Smith (the plurality) found that the contract was a requirements contract, that the failure to order the work constituted a breach of contract, and that the Government was not entitled to the protection of the "Termination for the Convenience of the Government" clause. The opinion observed that if there were no limits on the Government's right to terminate, the contract would fail for lack of consideration:

> We note as one of the most elementary propositions of contract law that a party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void, and we question if the government's termination for convenience clause should be construed that broadly.

If then traced the development of the concept of termination for convenience finding that it was a device to get the Government out of a contract when circumstances changed after the contract was awarded. The opinion declared that the "history of cases in this court demonstrates this" concept:

> The response in this court was to rely on the risk allocation nature of the concept and to allow termination for convenience only when the expectations of the parties had been subjected to a substantial change. The contractor risked losing the full benefit of his performance if something occurred, apart from the bargain and the expectations of the parties, that made continuance of the contract clearly inadvisable.

It rejected the Government's contention that not permitting convenience terminations when motivated by "bad faith" or as a result of an "abuse of discretion" would satisfy the consideration requirement.

With respect to bad faith as a limit, the opinion cited the "extreme" difficulty of proving bad faith, given the presumption that Government officials act in good faith and the proof requirements stated in the *Kalvar* decision. There, the court found that the plaintiff had not demonstrated bad faith on the part of the Government because it made an "insufficient showing of malicious intent or 'animus' toward it in order to avoid the limitations of the termination-for-convenience clause." As to abuse of discretion, the opinion stated that it is a doctrine that places limits on otherwise legal actions because of some "clear wrong" but is not "applicable to actions that simply are not legal at all." Thus, it concluded that a termination for the convenience of the Government would be valid only when the circumstances changed after the contract was awarded.

• *Concurring Opinions*–A close examination of the three concurring opinions is essential to understanding just what was decided in *Torncello*. Judge Davis thought it unnecessary to invoke a changed circumstances doctrine. He opined that the requirements for establishing bad faith were not so onerous as indicated in the plurality opinion and indicated that he would be

ready to hold that the CO acted in bad faith. In addition, he stated that he "would have no difficulty in holding that it was an abuse of discretion to use the clause to end the contract because lower prices could be obtained elsewhere when the contracting officer already knew that very fact before he consummated the contract with plaintiff."

Judge Nichols went further in his concurring opinion, recognizing the "all or none" basis of the contract award, and would have found an abuse of discretion under the circumstances. He stated that the Government:

> would be estopped to eliminate from the award by termination any items just because, separately considered, they were at unfavorable prices, while retaining all those bid at favorable prices. The administration of the contract must be consistent with the rules used in evaluating the bids, to which the bidders conformed in bidding.

Thus, he believed that it was unnecessary to rely on the changed circumstances rationale.

Chief Judge Friedman's concurring opinion discussed neither bad faith nor abuse of discretion. It contained only the following statement:

> As I understand the court's opinion, the court holds only that when the government enters into a requirements contract, knowing that it can obtain an item the contract covers for less than the contract price and intending to do so, there cannot be a constructive termination for convenience of the government when the government follows that course. On that basis, I join in the opinion.

As we shall see, this cryptic statement seems to have been the source of decisions misstating what was decided in *Torncello*.

Misstating *Torncello*

Torncello has been cited for various legal propositions in 90 board of contract appeals decisions, 4€ Claims Court and Court of Federal Claims decisions, and 12 Federal Circuit decisions. many of these citations are reminiscent of the story of the blind men and the elephant–each deals with only a part of the beast. As a result, there are some misconceptions as to what the plurality and the concurrers really decided. In particular is the question of whether *Torncello* was decided on the ground that the Government entered into a contract with no intention of performing. This is how it was described in *Salsbury Industries v. U.S.*, 905 F.2d 1518 (Fed. Cir. 1990), 9 FPD ¶86, 32 GC ¶ 244. There, the Postal Service determined an offeror to be nonresponsible and awarded the contract to plaintiff. Subsequently, a District Court judge declared that the determination was improper and enjoined the Postal Service to cancel the award. The contractor argued that the termination was not justified because it was a result of the improper nonresponsibility determination and there was no change in circumstances. The court rejected the change in circumstances argument, stating:

> *Torncello* has nothing to do with this case. It stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause.

This "explanation" of *Torncello* was cited with approval in *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578 (Fed. Cir. 1995), 14 FPD ¶ 46, 37 GC ¶ 423, another case concerning termination for convenience following a flawed award.

Our examination of *Torncello* does not support that characterization. It is only in Chief Judge Friedman's opinion that such a suggestion might be found. The phrase "and intending to do so" does not have support in any of the other opinions. Neither the plurality opinion nor the concurring opinions of Judges Davis and Nichols conditioned the finding of breach of contract on a finding that the Government entered into the contract with no intention of performing. There is no suggestion in any of those opinions that the Government had any such intention. The Findings of Fact in the ASBCA decision contained no such conclusion. The most that can be said is that such an intention might be inferred from the Government's argument that it had entered into an indefinite quantity contract rather than a requirements contract. However, that is a long way from saying that the plurality opinion and the other concurring opinions were based upon such an inference. Further, *Torncello* overruled *Colonial Metals Co. v. U.S.*, 204 Ct. Cl. 320, 494 F.2d 1355 (1974), 16 GC ¶ 173, a case that upheld a termination for convenience where the Government knew or should have known at the time the contract was awarded that it could have obtained the items for lower prices. However, nowhere in *Colonial Metals* was it suggested that the Government entered into the contract with the intention of not performing, nor was its overrule based upon the assumption that such was the Government's intention at the time of award. Thus, *Krygoski's* reliance on *Salsbury* and *Caldwell & Santmyer* is questionable at best.

What Are The Limits?

If other panels follow *Krygoski* and refuse to recognize the changed circumstances concept, we are left with bad faith and abuse of discretion as the limitations on the Government's right to terminate for convenience. That said, a number of questions remain. Are bad faith and

abuse of discretion to different concepts or are they merely different ways of saying the same thing? In *Kalvar*, the court, based upon the plaintiff's failure to distinguish between the two, treated them the same "only for purposes of the decision." However, in *Torncello*, both the plurality and Judge Davis considered the two to be different concepts. Conversely, in Footnote 3, *Krygoski* cites *Keco Industries, Inc. v. U.S.*, 203 Ct. Cl. 566, 492 F.2d 1200 (1974), 16 GC ¶ 104, for the proposition that bad faith is one of the factors to be considered in determining whether discretion has been abused, as follows:

> The Court of Claims enumerated four factors to apply in determining whether contracting officers abused their discretion: (1) the procurement official's bad faith, (2) the reasonableness of the decision, (3) amount of discretion delegated to the procurement official; and (4) violations of an applicable statute or regulation alone may be arbitrary.

• *Bad Faith*–We have written about this standard a number of times. For example, see my article *Bad Faith: The Dark Side*, 4 N&CR ¶ 46. and Ralph's piece, *Bad Faith: The Well-Nigh Irrefragable Proof Standard*, 8 N&CR ¶ 53. In those articles we reported on the oft-repeated statement that to prove bad faith a contractor must (1) prove specific intent to harm the plaintiff and (2) prove this intent with well-nigh irrefragable proof. These statements have been around for so long and have been made so often, that we tend to take them as gospel without critical analysis. Upon further analysis, we wonder whether proof of specific intent to harm the plaintiff is really a requirement. The following statement from *Kalvar* is usually credited with announcing the proposition:

> Any analysis of a question of Governmental bad faith must begin with the presumption that public

officials act "conscientiously in the discharge of their duties." *Librach v. United States*, 147 Ct. Cl. 605, 612 (1959). The court has always been "loath to find to the contrary," and it requires "well-nigh irrefragable proof" to induce the court to abandon the presumption of good faith dealing. *Knotts v. United States*, 128 Ct. Cl. 489, 492, 121 F. Supp. 630, 631 (1954).

In the cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been equated with evidence of some *specific intent to injure the plaintiff.* Thus, in *Gadsden v. United States*, 111 Ct. Cl. 487, 489-90, 78 F. Supp. 126, 127 (1948), the court compared bad faith to actions which are "motivated alone by malice." In *Knotts, supra,* at 128 Ct. Cl. 500, 121 F. Supp. 636, the court found bad faith in a civilian pay suit only in view of a proven "conspiracy...to get rid of plaintiff." Similarly, the court in *Struck Constr. Co. v. United States*, 96 Ct. Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was "designedly oppressive." But in *Librach, supra,* at 147 Ct. Cl. 614, the court found no bad faith because the officials involved were not "actuated by animus toward the plaintiff."

As we have already stated, it was this statement in *Kalvar* that motivated the *Torncello* plurality to adopt the changed circumstances concept. By contrast, Judge Davis did not believe that proof of specific intent to harm was a necessary ingredient to a finding of bad faith and that *Kalvar* did not necessarily so hold. His concurring opinion stated:

Third, I do not agree that "bad faith" is as narrow as Judge Bennett says it is. In *Kalvar, supra*–the case he cites–this court said, without in any way seeking to modify our prior holdings: "...many of our prior decisions seem implicitly to accept the equivalence of

> bad faith, abuse of discretion, and gross error." 211 Ct. Cl. at 198, note 1, 543 F.2d at 1301, note 1. *Kalvar* expressly held that contractor had failed to show either bad faith or abuse of discretion...and the limited definition of bad faith quoted in the opinion gave merely one aspect of the concept of "bad faith." Here, too, I would be ready to hold that a contracting officer acted in bad faith when he terminated a contract for convenience to get a better price of which he had full knowledge (and which was available) at the time when he deliberately entered into the contract with plaintiff.

Thus, it is ironic to find the *Salsbury, Caldwell & Santmyer,* and *Krygoski* panels using the concurring opinions to discredit the plurality opinion, then quoting from the discredited plurality opinion for the proposition that specific intent to harm is required and ignoring the concurring opinion's reservations concerning the need for proof of specific intent to harm.

Even more confusing are the statements concerning the overruling of *Colonial Metals. Krygoski* agrees with Judge Davis that the *Torncello* court had sufficient grounds to overrule it using the *Kalvar* standards, stating: "Despite the adequate justification to overrule *Colonial Metals* under the existing *Kalvar* test, a plurality of judges in *Torncello* proceeded to articulate in dicta a broader test for gauging the sufficiency of a convenience termination." If the Government's action in *Colonial Metals* constituted bad faith, how can specific intent to harm be required? Neither a precontract intention to dishonor the contract nor a specific intent to harm the contractor were present in that case. The only basis for overruling the decision was that the Government entered into the contract with the knowledge, or reason to know, that the material could be obtained for a lower price. Nevertheless, *Salsbury* and

Caldwell & Santmyer, which are cited approvingly in *Krygoski*, indicate that proof of specific intent to injure would be necessary to overcome the presumption that Government officials act in good faith.

• *Abuse of Discretion*–The convenience termination cases give little guidance on this subject. However, it is routinely raised in other areas of Government contracting. For example, the Government may not arbitrarily refuse to grant approval where a clause provides that approval must be obtained by the contractor, e.g., *Hoel-Steffen Construction Co. v. U.S.*, 231 Ct. Cl. 128, 684 F.2d 843 (1982), 24 GC ¶ 279. This is one aspect of the implied duty of good faith and fair dealing which all contracting parties are required to observe. See Ralph's discussion in *The Duty of Good Faith and Fair Dealing: An Emerging Concept?*, 3 N&CR ¶ 78. In addition, the Government is required to exercise discretion in deciding whether to terminate a contract for default, *Schlesinger v. U.S.*, 182 Ct. Cl. 571, 390 F.2d 702 (1968), 10 GC ¶ 129. It would be appropriate to apply the abuse of discretion standards developed under these other areas to convenience terminations.

Terminations In Support Of Competition

One area in which the Government will be given wide latitude in terminating for convenience is where the aim of the termination is to cure a flawed procurement. In this regard, the court in *Krygoski* stated:

> Recent enactments, however, have underscored rules of Government contracting which render the plurality's dicta in *Torncello* inapplicable to the present regime of contract administration. Recent statutes fully address the concerns of the *Torncello* plurality regarding the Government's shopping for lower prices after contract award. The Competition in Contracting Act (CICA)...compels the promulgation of

regulations and procedures to ensure full and open competition. *See* 41 U.S.C. §§ 401, 405(a) and 416 (1994).

In 1984, CICA articulated significant factors addressing a contracting officer's decision to terminate a contract for the Government's convenience. CICA requires executive agencies, when procuring property or services, to "obtain full and open competition through use of competitive procedures." 41 U.S.C. § 253(a)(1)(A) (1994). Thus, CICA ensures that contracting officers receive bids at competitively low prices. For each solicitation, a contracting officer must maintain full and open competition in the procurement process, unless one of the limited exceptions applies. *See* 10 U.S.C. § 2304 (1994). CICA mandates impartial, fair, and equitable treatment for each contractor. *See* 10 U.S.C. §§ 2304 and 2305 (1994).

This competitive fairness requirement, with its bid protest remedies, restrains a contracting officer's contract administration. If, for instance, a contracting officer discovers that the bid specifications inadequately describe the contract work, regulations promulgated under CICA may compel a new bid. *See* 10 U.S.C. § 2305; 48 C.F.R. § 1.602-2. Thus, to accommodate CICA's fairness requirements, the contracting officer may need to terminate a contract for the Government's convenience to further full and open competition. 48 C.F.R. §§ 1.602-2(b); *see* 41 U.S.C. § 414 (1994). Thus, to further its full competition objective, CICA permits a lenient convenience termination standard.

While CICA does not deal with terminations for convenience, correcting a flawed procurement can certainly be considered to further full and open competition. Ironically, the majority of cases cited in

Torncello as demonstrating changed circumstances were flawed contract awards:

> The history of cases in this court demonstrates this. *John Reiner & Co. v. United States,* 163 Ct. Cl. 381, 325 F.2d 438 (1963), *cert. denied,* 377 U.S. 931 (1964) (irregularity in the bid award); *Brown & Son Elec. Co. v. United States,* 163 Ct. Cl. 465, 325 F.2d 446 (1963) (irregularity in bid award); *Nesbitt v. United States,* 170 Ct. Cl. 666, 345 F.2d 583 (1965), *cert. denied,* 383 U.S. 926 (1966) (refusal of contractor to meet requirements); *Warren Bros. Roads Co. v. United States,* 173 Ct. Cl. 714, 355 F.2d 612 (1965) (irregularity in the bid award); *Coastal Cargo Co. v. United States,* 173 Ct. Cl. 259, 351 F.2d 1004 (1965) (irregularity in bid award); *Schlesinger v. United States,* 182 Ct. Cl. 571, 390 F.2d 702 (1968) (plaintiff under investigation by Senate for procurement irregularities, and in technical default); *Nolan Bros. v. United States,* 186 Ct. Cl. 602, 405 F.2d 1250 (1969) (physical changes at site made performance impossible); *G.C. Casebolt Co. v. United States,* 190 Ct. Cl. 783, 421 F.2d 710 (1970) (irregularity in the bid award).

However, a distinction should be made between an irregularity in the award process, such as improper nonresponsibility determinations or specifications not reflecting the Government's needs, and cases where the Government becomes unhappy with award but the competition was not flawed. Convenience termination would appear to be appropriate in the former cases but not in the latter.

Constructive Terminations And Indefinite Quantity Contracts

Application of a termination for convenience in these types of situations presents several unique issues.

Krygoski involved the express use of the "Termination for Convenience of the Government" clause and did not involve an indefinite quantity contract.

• *Constructive Terminations*–There are significant differences between an express termination and a constructive termination. The constructive termination for convenience doctrine judicially converts an act that would otherwise be a breach of contract into a termination for convenience of the Government. The theory is that the Government is entitled to the protection (primarily avoiding liability for anticipated profits) of the "Termination for Convenience" clause if it *could have* terminated for convenience at the time of the breach, *John Reiner & Co. v. U.S.*, 163 Ct. Cl. 381, 325 F.2d 438 (1963), 5 GC ¶ 583, *cert. denied*, 377 U.S. 931 (1964). Under this doctrine, the CO can play it safe by declining to terminate for convenience and avoiding any liability under that clause (costs incurred plus profit on work done) while retaining the protection of that clause (avoiding anticipated profits) if its action is considered a breach of contract. We question whether such a result is consistent with concepts of good faith and fair dealing. See our discussion in *Termination for Convenience of the Government: Another Chink in the Boilerplate*, 2 N&CR ¶ 43. There, we discussed *Maxima Corp. v. U.S.*, 847 F.2d 1549 (Fed. Cir. 1988), 7 FPD ¶ 60, 32 GC ¶ 244 (Note), in which the Federal Circuit refused to apply the constructive termination doctrine where the Government failed to order the minimum quantity under an indefinite quantity contract and almost one year after the contract term expired claimed that its failure should be treated as a constructive termination. The court recognized the concept of constructive termination as a risk allocation device based upon changed circumstances, stating: "These cases are in tune with the purpose of reducing the government's risk based on unexpected events that occur during the term of a contract, by shifting some of this

risk to the contractor." Since the Government took no *overt* action during the contract period which could be considered a breach, the court did not decide the case on the changed circumstances issue. The decision only held that the Government cannot take advantage of the constructive termination doctrine after the contract has been performed. However, it is interesting to note that the *Government* embraced the *Torncello* changed circumstances concept:

> The government in its brief acknowledges the principle that "changed expectations" is a prerequisite to termination of a contract for convenience, under the authority of *College Point [College Point Boat Corp. v. U.S.*, 267 U.S. 12 (1925)] and Court of Claims precedent. The government argues that the Agency's failure to order the minimum quantities from [the contractor] is proof of changed expectations. However, this governmental action taken a year after completion of performance of the contract by both parties is not a cancellation based on changed expectations. It is, at best, a claim for retroactive adjustment in the contract price.

• *Indefinite Quantity Contracts*–The court in *Maxima* granted recovery of the full contract price for the minimum quantity on the ground that the contract had required the contractor to stand by for orders for the full contract period and that the contractor had fully performed this obligation. However, this concept of "buying of availability" for the full contract period appears to be limited to contracts where the contractor is required to respond very quickly to very large orders as Ralph observed in *Indefinite Quantity Contracts: Compensation for Not Ordering Minimum Quantity*, 10 N&CR ¶ 40. There he pointed out the unique problems with terminations for convenience under indefinite quantity contracts, where termination one day before the

contract period ended would result in compensation under the convenience clause while termination one day after would result in breach of contract damages. His solution would treat all failures to order the minimum quantity as a breach of contract. An alternative would be to permit the Government to utilize the protection of the "Termination for Convenience" clause only when it was expressly invoked during the contract period within a reasonable time after changed circumstances were recognized. This would not require a change in the clause, nor would it require a major shift in the case law. It would be consistent with *Maxima* and would not be inconsistent with the spirit of *Krygoski*.

Summary

It might be, as our friend and critical observer, Alan Washburn, put it, that *Krygoski* has put a "copper rivet in the casket" of the changed circumstances concept. However, as our review of these cases has indicated, the bad faith and abuse of discretion standards have been, at best, only superficially examined in the opinions, and many inconsistencies exist between the facts of the cases and the language of the decisions. Further, the constructive termination and indefinite quantity contract issues present major problems. We wonder whether this mess will ever be straightened out.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

KRYGOSKI CONSTRUCTION COMPANY, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that when the contracting officer terminated the contract pursuant to a termination for convenience clause, and did not act in bad faith or abuse his discretion, the contractor is limited to recovering termination for convenience damages and not anticipatory profits.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-17a) is reported at 94 F.3d 1537. The decisions of the United States Court of Federal Claims (Pet. App. 1b-46b, 1c-35c) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1996. A petition for rehearing was denied on November 7, 1996. Pet. App. 1d. The petition for a writ of certiorari was filed on February 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 30, 1985, the United States Army Corps of Engineers awarded a contract to petitioner for the demolition of an abandoned U.S. Air Force airfield and missile site near Raco, Michigan. Based upon blueprints and its surveys, the Corps estimated that two buildings at the site contained asbestos contamination in 1,600 linear feet of pipe insulation and 650 square feet of tank and duct insulation. The surveys also revealed that extensive vandalism may have spread debris containing asbestos on the floors of the buildings. Pet. App. 2a. The Corps estimated that bids should range between $500,000 and $1,000,000. Based on the Corps' estimated quantities, petitioner was awarded the contract with its bid of $414,696, which was the low bid among seven other bidders. *Id.* at 2a, 5b. The Corps estimated that the asbestos removal would cost about $40,000, which was approximately 10% of the total cost of the contract. *Id.* at 15a.

Ten days after petitioner acknowledged receipt of the Corps' notice to proceed with the contract, petitioner notified the Corps that its predemolition survey revealed asbestos in the vinyl flooring and roof insulation of the Raco buildings. Petitioner proposed removing the tile for a unit price of $8.78 per square foot, which was the unit cost of removing additional duct insulation under the contract. Pet. App. 3a. Further tests revealed the presence of asbestos contamination in the floor tile and flashing in one building, but not in the roof insulation. *Id.* at 3a-4a. Based on its examination of drawings of the site, the Corps estimated that 36,340 square feet required asbestos removal, which, at $8.78 per square foot,

resulted in increased costs of about $320,000. *Id.* at 4a.

On September 5, 1986, the contracting officer terminated the contract for the convenience of the government under a provision of the contract that provides that

> [t]he Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest.

Pet. App. 4a, 15a. The contracting officer followed the Corps' general policy of terminating the contract for the convenience of the government and reprocuring the contract competitively when a price increase would exceed 33% of the total contract price. The contracting officer also considered the fact that petitioner had not started work on the contract, but only had transported four pieces of equipment to the Raco site. *Id.* at 4a. Following the termination, the Corps solicited new bids based upon the additional asbestos work. Petitioner, the sixth-lowest bidder out of eight, bid $1,200,000 to perform the work. The contract was awarded to the lowest bidder for a price of $443,200, and the government ultimately paid $542,861.60 to the new contractor for the work. *Ibid.*

2. On April 19, 1989, petitioner filed suit in the United States Claims Court[1] seeking a determination that the Corps had breached its contract. On March

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[1] On October 29, 1992, the United States Claims Court became the United States Court of Federal Claims. See Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Tit. IX, § 902(b), 106 Stat. 4516 (codified at 28 U.S.C. 171 note).

2, 1993, the court issued its opinion holding that the Corps breached its contract by improperly terminating the contract for the convenience of the government. Pet. App. 1b-46b. Relying on *Torncello* v. *United States*, 681 F.2d 756 (1982), in which a plurality opinion of the en banc United States Court of Claims stated that the termination for convenience clause applies only when there is some change from the parties' original bargain, the Claims Court held that the government "shows no requisite change of circumstances on which to justify a termination for convenience." Pet. App. 33b-34b. The court alternatively concluded that even were it to reject "the *Torncello* rule" in this case and apply the rule of *Kalvar Corp.* v. *United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976), cert. denied, 434 U.S. 830 (1977), which held that the government may invoke the termination of convenience clause in the absence of proof of bad faith or abuse of discretion, the contracting officer's termination of the contract in this case "constituted an abuse of discretion." Pet. App. 46b; see also *id.* at 37b. On May 19, 1995, the court awarded petitioner damages in the amount of $1,456,851, which included anticipatory profits. *Id.* at 5a, 34c-35c.

3. The court of appeals reversed. Pet. App. 1a-17a. The court began by observing that although "[a]n examination of termination for convenience law from several decades ago discloses mixed signals about limiting terminations under the bad faith/abuse of discretion standard in *Kalvar*, or the change of circumstances test in *Torncello*," "[a] full review of more recent case law, coupled with recent enactments * * * discloses a clear signal for implementation of termination for convenience clauses." *Id.* at 5a-6a (citations omitted). The court described the develop-

ment of the termination for convenience clause, and explained that the clause historically had been limited only by the presence of "bad faith or an abuse of contracting discretion." *Id.* at 7a.

The court also described the 1982 *Torncello* decision by a plurality of judges of the court's predecessor, the Court of Claims. Pet. App. 8a-10a. In *Torncello*, the Navy, "knowing it could acquire the same services at a lower price from another contractor," entered into an exclusive requirements contract and "then began satisfying its requirements from th[e] cheaper source." *Id.* at 8a. Instead of simply applying past precedent and holding that the Navy acted in bad faith, the plurality "proceeded to articulate in dicta a broader test for gauging the sufficiency of a convenience termination" that required "some change in circumstances between the time of award of the contract and the time of termination." *Id.* at 10a.

The court of appeals then explained that the Competition in Contracting Act (CICA), Pub. L. No. 98-369, Title VII, 98 Stat. 1195, enacted in 1984, "fully address[es] the concerns of the *Torncello* plurality regarding the Government's shopping for lower prices after contract award." Pet. App. 11a. The court observed that CICA may compel termination and reprocurement if "a contracting officer discovers that the bid specifications inadequately describe the contract work." *Ibid.* (citing 10 U.S.C. 2305 and 48 C.F.R. 1.602-2). The court further explained that "[i]n the wake of CICA," the Federal Circuit has twice "rejected the reasoning of the *Torncello* plurality" and limited the decision in *Torncello* as "stand[ing] for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot

avoid a breach by adverting to the convenience termination clause." Pet. App. 12a-13a, 14a (citing *Salsbury Indus.* v. *United States*, 905 F.2d 1518, 1521 (1990), cert. denied, 498 U.S. 1024 (1991), and *Caldwell & Santmyer, Inc.* v. *Glickman*, 55 F.3d 1578, 1582 (1995)).

Turning its attention to the present case, the court noted that the termination for convenience clause, which "governs the legal relations of the parties," grants the contracting officer the discretion "to terminate the contract with [petitioner] because removing the asbestos-containing vinyl tile would constitute a cardinal change from the originally competed contract." Pet. App. 15a. The court further observed that after the costs of asbestos removal work increased from "$40,000 out of an estimated $415,000 demolition contract" to "$360,000 on a contract near $775,000," the asbestos removal work "originally about 10%, became about 50% of the contract work." *Id.* at 15a-16a. Given that "change in the scope of contract work," the court explained, "different bidders, like asbestos-removal firms, may have entered the competition on the contract." *Id.* at 16a. In these circumstances, the court concluded, "the contracting officer had ample justification for conducting a reprocurement competitively under CICA." *Ibid.*

Finally, the court held that "because *Torncello* applies only when the Government enters a contract with no intention of fulfilling its promises," the "trial court erred by invoking and relying upon the *Torncello* test." Pet. App. 16a-17a. Based on the absence from the record of any evidence "that the Corps intended from the outset to void its promises," the court held that "*Torncello* does not apply," and

that the contracting officer otherwise "did not abuse his discretion, act arbitrarily or capriciously or in bad faith in terminating the contract for the Government's convenience." *Id.* at 17a. Accordingly, the court reversed and remanded the case for a calculation of "termination for convenience damages which are to include costs of performance prior to termination, profits on that performance and termination costs," but are not to include "anticipatory profits." *Ibid.*

ARGUMENT

The decision of the Federal Circuit is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner argues that the decision below "calls into doubt the enforceability of government contracts," because "the possibility exists that either party may 'walk away' from a contract at any time during performance." Pet. 13. According to petitioner, because the court of appeals' decision "permit[s] the government to cancel a contract at any point," the contract is "void and unenforceable" for lack of consideration. Pet. 22-23. Those contentions are without merit.

a. The termination for convenience clause permits the government to "terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest." 48 C.F.R. 52.249-2(a); Pet. App. 4e. That provision does not render the contract unenforceable. The government's ability to terminate the contact for the convenience of the government is not without limits. As

the court of appeals observed, "[w]hen tainted by bad faith or an abuse of contracting discretion, a termination for convenience causes a contract breach." Pet. App. 7a. Moreover, the government may not invoke the termination for convenience clause with impunity. In the event of a termination, the contractor may be awarded damages that may include: a "reasonable allowance for profit on work done" (48 C.F.R. 52.249-2(f); Pet. App. 7e); "[t]he contract price for completed supplies or services accepted by the Government" (48 C.F.R. 52.249-2(g)(1); Pet. App. 8e); "[t]he costs incurred in the performance of the work terminated, including initial costs and preparatory expenses allocable thereto" (48 C.F.R. 52.249-2(g)(2); Pet. App. 8e); and "[t]he reasonable costs of settlement of the work terminated" (48 C.F.R. 52.249-2(g)(3); Pet. App. 8e). Indeed, the court of appeals remanded the case for the calculation of "termination for convenience damages," including the costs of performance, profit on that performance, and termination costs. Pet. App. 17a.[2]

Petitioner similarly argues that the decision below conflicts with the principle "requiring the government to fulfill the terms of contracts into which it enters or face liability under the general law of

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[2] In support of its argument that the contract it entered into lacked consideration, petitioner solely relies (Pet. 22-23) on decisions involving indefinite quantities contracts, which were held to be lacking in consideration because they contained no required minimum quantities. See *Willard, Sutherland & Co.* v. *United States*, 262 U.S. 489, 493 (1923); *William C. Atwater & Co.* v. *United States*, 262 U.S. 495, 498 (1923); *United States* v. *White Oak Coal Co.*, 5 F.2d 439, 441 (4th Cir. 1925); *Ralph Constr., Inc.* v. *United States*, 4 Cl. Ct. 727, 733 (1984). Those decisions have no bearing on the present case.

contracts." Pet. 23. That argument, however, ignores the fact that terms of the contract to which petitioner objects are part of the bargain petitioner struck with the government. Petitioner offers no reason why it should not be bound by the contract's terms. Cf. *United States* v. *Winstar Corp.*, 116 S. Ct. 2432, 2471 (1996) ("It is, after all, not uncommon for a contracting party to assume the risk of an event he cannot control.").[3]

2. a. Petitioner also mistakenly argues (Pet. 17-21) that Federal Circuit decisions addressing the question presented are "confusing" and "inconsistent." Petitioner contends (Pet. 19-20) that the court of appeals' decision in *Maxima Corp.* v. *United States*, 847 F.2d 1549 (Fed. Cir. 1988) follows the "changed circumstances" rule of *Torncello*, while the more recent decisions in *Salsbury, Caldwell & Santmyer*, *supra*, and the present case limit the *Torncello* decision to circumstances in which the government enters into a contract with the intent not to perform. The court of appeals correctly determined, however, that its recent decisions "disclose[] a clear signal for implementation of termination for convenience clauses." Pet. App. 5a-6a.

The decision in *Maxima* is not to the contrary. In that case, the government attempted retroactively to invoke the termination for convenience clause after completion of the term of a contract in which the

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[3] The fact that petitioner submitted a new bid for the work even after the government purportedly "walked away" (Pet. 13) from the first contract suggests that petitioner was not unwilling once again to enter into a contract that included a convenience termination clause.

government failed to order the minimum quantity of services required under the contract. 847 F.2d at 1551. The government conceded that the "changed expectations" test applied in that case, but it argued that the government's failure to order the required minimum services constituted the requisite change. *Id.* at 1555. The court held, however, that the constructive termination "a year after completion of performance of the contract by both parties is not a cancellation based on changed expectations. It is, at best, a claim for retroactive adjustment in the contract price." *Ibid.* Thus, as the court of appeals below observed, "*Maxima* stands for the proposition the Government cannot retroactively create a breach in order to change the Government's obligations under a completed contract." Pet. App. 10a n.2.[4]

b. Although not addressed by petitioner, the court of appeals also correctly held that CICA has "render[ed] the plurality's dicta in *Torncello* inapplicable to the present regime of contract administration." Pet. App. 10a-11a. CICA requires that when procuring property or services, the government "shall obtain full and open competition through the use of competitive procedures," 41 U.S.C. 253(a)(1)(A) (1994). As the court of appeals stated, "to accommodate

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[4] Petitioner also argues (Pet. 20-21) that "confusion exists in the decisions of the Court of Federal Claims" on whether the *Torncello* "changed circumstances" rule or the bad faith test governs convenience terminations. Petitioner, however, fails to cite any decisions indicating that trial courts continue to misapply or question the scope of the *Torncello* rule after the 1990 decision in *Salsbury* and the 1995 decision in *Caldwell & Santmyer*. In any event, the uniformity of recent Federal Circuit decisions and the lack of a circuit conflict on the issue belie any need for review by this Court.

CICA's fairness requirements, the contracting officer may need to terminate a contract for the Government's convenience to further full and open competition." Pet. App. 11a. Thus, the court of appeals correctly concluded that "CICA permits a lenient convenience termination standard." *Ibid.*

c. In any event, this case would not be an appropriate vehicle to review whether the "changed circumstances" standard of *Torncello* applies to all convenience terminations. The court below held that "[t]he trial court improperly found no change of circumstances sufficient to justify terminating the contract for the Government's convenience," and the court further noted that "arguably the Government's circumstances had sufficiently changed to meet even the *Torncello* plurality standard." Pet. App. 16a. Thus, petitioner has not demonstrated that the outcome of this case would likely be different had the court of appeals applied the *Torncello* standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

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NO. 96-1236

IN THE
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OCTOBER TERM, 1996

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Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR AMERICAN DEFENSE PREPAREDNESS ASSOCIATION/NATIONAL SECURITY INDUSTRIAL ASSOCIATION, AMERICAN SHIPBUILDING ASSOCIATION, ELECTRONIC INDUSTRIES ASSOCIATION, AND SHIPBUILDERS COUNCIL OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The American Defense Preparedness Association/ National Security Industrial Association (ADPA/NSIA) is a national organization of more than 900 companies and 28,000 individual members dedicated to promoting awareness by all elements of American society of the need for a strong defense posture; identifying and studying problems affecting the common defense and national security of the United States; and encouraging mutual understanding and a close working relationship between American commerce and industry and those segments of the United

States government responsible for the common defense and national security. The American Shipbuilding Association is a national organization, and its six members are the major U.S. shipbuilders whose Government contracts account for over 95% of all new construction funds that are appropriated by Congress for the purpose of building ships for the U.S. Navy. The Electronic Industries Association is a national organization of more than 1200 companies involved in the development and production of televisions, radios, computers, telecommunications devices, radars, avionics, and other military and commercial electronic equipment. The Shipbuilders Council of America is a trade association that promotes a sound private shipbuilding and ship-repair industry in the United States.

The Federal Circuit's decision in *Krygoski* jeopardizes the enforceability of government contracts containing termination for convenience ("T/C") clauses and is of paramount importance to Amici and their constituent members. Most of the government contracts to which Amici's members are parties contain T/C clauses similar to the one at issue in this case.

Counsel for the parties have consented to the filing of this brief in letters filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Court should grant the petition because the decision of the Federal Circuit jeopardizes the enforceability of all government procurement contracts incorporating the standard T/C clauses mandated by the Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 49.502. Under such a clause, "[t]he Government may terminate performance of the work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest." *Id.* § 52.249-2(a). Upon such a termination, the clause deprives the contractor of the

full benefit of its bargain by limiting the contractor's recovery to payment for work done and denying recovery of profit on terminated work.

Evolution of the T/C clause shows that it was born of wartime necessity to provide the Government the right to end a procurement contract when the circumstances causing the contract to be made had substantially changed and it was apparent that continuance of the contract was not in the best interest of the Government. *See College Point Boat Corp. v. United States*, 267 U.S. 12, 15-16 (1925); *United States v. Penn Foundry & Mfg. Co.*, 337 U.S. 198, 205-206 & nn. 2 & 3, 214-16 (1949) (Douglas, J., concurring). No statute currently addresses the scope of the T/C clause. Neither the regulations nor the terms of the clause contain any express limitation on its exercise. Nevertheless, it is incontrovertible that the T/C clause would make the government contract illusory and unenforceable by either party unless there are meaningful limitations on its exercise.

The Court of Claims' en banc plurality decision in *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982), recognized the need for a meaningful limitation on the exercise of the T/C power to provide consideration and mutuality to make the government contracts enforceable. The court viewed the T/C clause as allocating the risk when the expectations of the parties had substantially changed. Under such changed circumstances the contractor would be paid its costs and profit on the work performed but would not be entitled to anticipated profit. *Torncello* thoroughly considered and rejected "abuse of discretion" and "bad faith" by the contracting officer as limitations and reestablished the substantial change in circumstances limitation. *Id.* at 766-71.

The Federal Circuit's decision in *Krygoski Constr. Co. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996), incorrectly rejected the changed circumstances limitation established by the plurality opinion in *Torncello* and held that "abuse of

discretion" and "bad faith" were the only limitations on the Government's exercise of the T/C power. The *Krygoski* court failed to discuss the contract requirements for consideration and mutuality of obligations and assumed that abuse of discretion and bad faith were sufficient limitations on the use of the T/C power. *Krygoski* makes both the Government's and the contractor's promises unenforceable at contract inception and as to unperformed work because there can be no consideration to support them and no mutuality of promises.

The *Krygoski* Court failed to recognize that abuse of discretion is not a limitation when there are no criteria by which to measure its exercise. Furthermore, the contracting officer's obligation not to act in bad faith or abuse his discretion in terminating for convenience is a pre-existing legal duty, independent of any contractual obligations. *See, e.g., Ripley v. United States*, 223 U.S. 695, 702-704 (1912). Performance of such a duty is not consideration, RESTATEMENT (SECOND) OF CONTRACTS § 73 (1979).

In interpreting the government contracts in *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), seven members of the Court concluded that unless the Government-promised accounting treatment was binding on the Government, the contracts would be illusory for lack of consideration and mutuality. *Id.* at 2470-71 (plurality opinion), at 2473-74 (Breyer, J., concurring), and at 2477 (Scalia, J., concurring). That rationale is applicable here.

Lack of consideration and mutuality render a government contract unenforceable. *Willard, Sutherland & Co. v. United States*, 262 U.S. 489 (1923). The *Krygoski* court failed to recognize that if the Government can walk away from the contract whenever it chooses to do so, the contractor is free to walk away from the contract whenever it chooses to do so. This would mean, contrary to the public interest, the contractor could refuse to perform if it underbid the contract

or could stop performance if it is losing money on the contract, and have the defense that the contract is unenforceable for lack of consideration. This side of the coin is the primary reason why the Court should grant the petition and clarify the rules that will govern the enforceability of government contracts.

The uncertainty and confusion created by *Krygoski* and other recent T/C decisions of the Federal Circuit further warrant granting the petition.

ARGUMENT

A. *Krygoski* Jeopardizes the Enforceability of Government Contracts For Lack of Consideration and Mutuality.

The decision of the Federal Circuit in *Krygoski Constr. Co. v. United* States, 94 F.3d 1537, 1545 (Fed. Cir. 1996), jeopardizes the enforceability of hundreds of billions of dollars of outstanding government contracts. In the Washington area alone, the federal government awarded over $20 billion in government contracts in fiscal year 1996. Peter Behr, *Contractors Set Record for Orders*, WASH. POST, Feb. 24, 1997, at A1.

The wartime predecessors to the T/C clauses authorized by Congress are described in the petition and the *Torncello* decision. *See Torncello v. United States*, 681 F.2d 756, 764-65 (Ct. Cl. 1982).[1] Since World War II, Congress has not enacted any law addressing the termination of contracts for

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[1] For World War I and II contracts there was no recovery of anticipatory profits on terminated work. *See College Point Boat Corp. v. United States*, 267 U.S. 12, 15-16 (1925); *United States v. Penn Foundry & Mfg. Co.*, 337 U.S. 198, 205-06 & nn. 2 & 3, and the concurring opinion of Mr. Justice Douglas, 337 U.S. at 214-16 (1949).

the government's convenience. *See* John Cibinic & Ralph C. Nash, ADMINISTRATION OF GOVERNMENT CONTRACTS 1074 (3d ed. 1995). Instead, the use of a prescribed T/C clause was made mandatory solely by government procurement regulations for defense contracts since 1950 and for civilian agency contracts since 1967. *Id.* FAR § 49.101(b) states that "the contracting officer shall terminate contracts whether for default or convenience, only when it is in the Government's interest." Beyond this bare statement, nothing is said in the FAR or in the termination clauses as to when termination for convenience may or may not be in the government's interest.

In *Torncello*, a plurality of the Court of Claims sitting en banc held that the government could not invoke the T/C clause unless "the circumstances of the bargain or the expectations of the parties have changed." 681 F.2d at 771. The principle underlying that analysis was that government contracts, like other contracts, must be supported by mutual consideration in order to be enforceable.

As the plurality in *Torncello* recognized, "[i]t is nothing more than basic contract law that a power to terminate must be limited in some meaningful way, as measured by the requirement of consideration." *Id.* at 772. In the absence of statutes under which Congress waives or restricts the application of the common law to government contracts, such as the wartime statutes discussed in *Torncello*, and in note 1 *supra*, common law principles generally govern the making and interpretation of government contracts. *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2464-65 (plurality opinion), 2473 (Breyer, J., concurring), 2477-79 (Scalia, J., concurring) (1996), and cases there cited. One of those principles requires that, in order to be enforceable, an exchange of contractual promises must be supported by consideration. Specifically, seven members of the Court concluded in *Winstar* that unless the Government-promised

accounting treatment was binding on the Government, the contracts would be illusory for lack of consideration and mutuality. *Id.* at 2470-71 (plurality opinion), at 2473 (Breyer, J., concurring), and at 2477-78 (Scalia, J., concurring); *see also Willard, Sutherland & Co.*, 262 U.S. at 493; *Torncello*, 681 F.2d 756.

The standard T/C clause, taken literally, would render the Government's contractual obligations illusory. *Willard, Sutherland & Co.*, 262 U.S. at 493; *Winstar*, 116 S. Ct. at 2464-65, 2473, 2477-79. "Words of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise." RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a, *Illusory Promises* (1979). Further, "if the promisor has an unfettered choice of alternatives, and one alternative would not have been consideration if separately bargained for, the promise in the alternative is not consideration." *Id.* Comment b, *Alternative promises.*

It is true that a contractual promise may be conditioned on a future event. In other words, a party can obligate itself, but also negotiate into the contract a condition the occurrence of which will excuse performance. But a conditional promise is illusory if the condition rests upon merely "the pleasure or future will of the promisor." Id. § 77 cmt. a. To avoid this result, the *Torncello* plurality restricted the government's use of the T/C clause to instances in which circumstances (beyond the sole control of the Government) surrounding the contract had changed.

By overlooking the basic contract rules of consideration and mutuality of obligation, the *Krygoski* court has jeopardized the enforceability of government procurement contracts, virtually all of which include a standard T/C clause. This is the primary reason for granting the petition.

B. The Federal Circuit Erred by Assuming that the Government's Promise to Forbear from Acting in Bad Faith or Abusing its Discretion in Terminating for Convenience Provided Consideration for the Contractor's Promise to Perform the Work.

The Federal Circuit's decision in *Krygoski* erred in assuming that abuse of discretion and bad faith are adequate limitations on the T/C power to preserve enforceability of the contracts.

Discretion cannot be abused when there are no limits on its exercise. *Torncello*, 681 F.2d at 771. Moreover, the decision fails to recognize that the contracting officer's obligation not to act in bad faith or abuse his discretion in terminating for convenience is a pre-existing legal duty, independent of any contractual obligations. *See, e.g., Kihlberg v. United States*, 97 U.S. 398, 402 (1878); *Ripley v. United States*, 223 U.S. 695, 702-704 (1912); *United States v. Wunderlich*, 342 U.S. 96, 102-103 (1951) (Jackson, J., dissenting); *Librach v. United States*, 147 Ct. Cl. 605, 612 (1959); 41 U.S.C. § 609(b) (finality of board decisions). "Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 73 (1979). *See also id.* § 73 cmt. b ("A legal duty may be owed to the promisor as a member of the public, as when the promisee is a public official"). *See also Floyd v. United States*, 26 Cl. Ct. 889, 891 (1992), *aff'd*, 996 F.2d 1237 (Fed. Cir.), *cert. denied*, 510 U.S. 925 (1993).

These legal errors of the *Krygoski* court and the unenforceability consequences they portend lend further support to granting the Petition.

C. The Confusion Created by *Krygoski* and Other T/C Decisions of the Federal Circuit Warrants Granting the Petition.

The Federal Circuit applied the *Torncello* "changed circumstances" limit in *Maxima Corp. v. United States*, 847 F.2d 1549, 1555-56 (Fed. Cir. 1988). Thereafter, it wandered off course, spoke unkindly of *Torncello* and applied a "bad faith limit" in *Salsbury Indus. v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991). Following this new trend, the Federal Circuit in *Krygoski* misconstrued *Torncello*, and held that the changed circumstances test did not apply "because *Torncello* applies only when the Government enters a contract with no intention of fulfilling its promises." *Krygoski*, 94 F.3d at 1545. The doctrine of consideration looks not, however, to whether a party "intends" to act in accordance with the contract, but to whether the party has in some way "obligated" itself to so act. Thus, a contract fails for lack of consideration when one party fails to promise such performance or leaves itself an "out" by which it can avoid performance should it later wish to do so.

The Federal Circuit's failure to address the fundamental contract requirements of consideration and mutuality of obligations in defining the criteria for exercise of the T/C power has created great uncertainty and confusion. *See* analysis by Professor Cibinic in John Cibinic & Ralph C. Nash, *Convenience Terminations: What Are The Limits?* ¶ 52 (1996).

Because the Federal Circuit has exclusive appellate jurisdiction over contract disputes involving the T/C clause, there is no prospect that other courts of appeals will help clarify this issue, and it is appropriate for this Court to act now to cure the disarray in the Federal Circuit by granting the petition in this case. *See* Pet. at 17-21.

CONCLUSION

For the reasons stated above, the Court should grant the petition for a writ of certiorari.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

No. 96-1236

KRYGOSKI CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

The Washington Legal Foundation ("WLF") respectfully submits this brief as amicus curiae in support of the petitioner, Krygoski Construction Company, Inc. ("Krygoski").

INTEREST OF AMICUS CURIAE

WLF is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF believes it is in the public interest to hold the federal government and its agencies accountable for their conduct, including their contractual dealings with the private sector.

WLF takes issue with the Government's position that the Government may, in the absence of changed circumstances, exercise the standard termination for convenience clause found in government contracts to

escape breach of contract damages. The Government's view of its contractual obligations would permit the United States to breach its contracts, denying to contractors the benefit of their bargains, without having to pay for the consequences of its breach, thereby holding the United States to a lesser standard of accountability than private parties. This position is contrary to law and will likely affect the future willingness of private businesses to contract with the Government. WLF believes it is in the public interest for the Court to recognize the significance of this issue to the broad business community as well as to society at large.[1]

WLF has appeared as amicus in numerous cases before this Court, including those that raise the issue of the extent to which the Government should be held accountable for its breaches of contractual obligations. *See, e.g., Wells Fargo Bank, N.A. v. United States*, No. 96-928, *cert. denied*, 1996 WL 723422 (Mar. 17, 1997).

STATEMENT OF THE CASE

Krygoski was the successful low bidder for a government contract that called for the demolition and removal of the structures at an old government missile facility. The contract also included the abatement of asbestos at the site. Because the Government did not determine the exact extent of the asbestos contamination prior to issuing the invitation for bids, the invitation provided only an estimate of the amount of asbestos that would need to be removed. The contract as issued provided rates for the removal of the estimated amount of asbestos as well as rates for amounts in excess of the estimates.

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[1] Petitioner and the United States have consented to the filing of this brief. Their respective letters of consent are filed herewith.

Following the award of the contract, Krygoski discovered that the actual amount of asbestos was higher than the estimate provided by the Government. The Government failed to conduct the joint inspection required by the contract, but acknowledged that the removal of the additional asbestos was encompassed by the terms of the contract. However, before Krygoski could begin the demolition process, the government contracting officer terminated the contract for the convenience of the government, citing an unwritten "rule of thumb" that required the automatic termination of any contract which required a net increase in cost of more than twenty-five to thirty percent.

REASONS FOR GRANTING THE WRIT

A. The Panel Decision Calls into Question the Enforceability of Government Contracts

The reasoning of the Federal Circuit panel below, if permitted to stand, will have serious and detrimental effects on the contracting process. In *Torncello v. United States*, 681 F.2d 756 (Cl. Ct. 1982) (en banc), the plurality decision clearly explained why the use of the standard government termination for convenience clause had to be limited to situations in which the circumstances or expectations of the parties surrounding the contract had changed. As explained in the briefs of petitioner and the other amici curiae, the Court of Appeals, by abandoning the changed circumstances test of *Torncello*, has called into question the enforceability of government contracts. If the panel decision in this case remains in effect and the relevant case law is not clarified, then government contractors and the Government must continue to question whether their contracts are supported by consideration.

The confusion surrounding the consideration issue may prove detrimental to the Government in subsequent contract disputes. If a contract is unenforceable for lack

of consideration, then that unenforceability extends both to the contractor *and* to the Government. Consequently, when faced with the prospect of losing money on a contract, a contractor may well stop work and, should the Government seek damages for breach of contract, raise the defense that the contract is unenforceable for lack of consideration.

B. The Panel Decision Fails to Resolve the Confused State of the Law Surrounding What Government Conduct Rises to the Level of Bad Faith

The petition in this matter raises as an included issue the appropriate definition and application of bad faith and abuse of discretion. Petition of Krygoski Construction Company, Inc. ("Petition") at 9 n.3. Even if the requirement that the Government refrain from acting in bad faith is sufficient to render the Government's promise non-illusory, the confused state of the law regarding what constitutes "bad faith" makes a reasoned prediction of what government action rises to the level of bad faith extremely difficult. *See* Petition at 9g (reprinting John Cibinic, Jr., *Convenience Terminations: What are the Limits?*, 10 NASH & CIBINIC REP. 147 (1996)).

Should the Court determine that a prohibition against bad faith or abuse of discretion provides the necessary consideration to render the contract enforceable, it should then define the scope of those concepts. We believe that the Federal Circuit failed to adequately address this subject and that its support for the contracting officer's application of a rule of thumb is contrary to law. The rule of thumb upon which the contracting officer relied was correctly found by the Court of Federal Claims to have no basis in law or regulation and should not be considered a basis for a finding that the contracting officer did not act in bad faith or abuse his discretion.

The unsettled state of the law was acknowledged and discussed at length by the trial court. *See* Petition at 37b-42b. The trial court analyzed three different definitions of bad faith: bad faith by specific intent to injure, bad faith by fraud, and bad faith by abuse of discretion. *See* Petition at 38b. Ultimately, the trial court settled on a definition encompassing the abuse of discretion standard. *See* Petition at 42b. The Court of Appeals applied the tests of bad faith and abuse of discretion, but failed to clarify the true contours of these standards. *See* Petition at 7a-8a. Consequently, confusion still reigns with respect to the scope of the bad faith doctrine.

C. The Contracting Officer's Reliance on an Unwritten "Rule of Thumb" That Triggers Contract Termination by the Government Is Itself an Abuse of Discretion and Constitutes Bad Faith

In reaching his decision to terminate the contract, the contracting officer relied on an unwritten rule of thumb that "required the automatic termination for convenience of any contract which required a net increase in cost of twenty-five to thirty percent, regardless of whether or not the increase was considered within the scope of the contract." *See* Petition at 11b. At the same time, the contracting officer acknowledged that the original contract had contemplated the complete removal of asbestos at the demolition site. Petition at 27b n.24. The trial court, noting that the contracting officer had provided no basis for his rule of thumb, and recognizing that the actual cost increase was ultimately *less* than this rule of thumb, held that the contracting officer abused his discretion and acted in bad faith in terminating the contract.

By reversing the trial court, the Court of Appeals accepted the contracting officer's unwritten rule of thumb, stating that in a termination for convenience, the

Court of Appeals would be "lenient." In accepting the rule of thumb, the panel without reference or citation ignored the decision of the Federal Circuit in *NI Industries, Inc. v. United States*, 841 F.2d 1104 (Fed. Cir. 1988). In *NI*, a contracting officer had denied a claim based upon a written but unpublished standard operating procedure. The Federal Circuit rejected the use of such a procedure, holding that the agency was without power to adopt and rely on such secret law, which affected all contractors, without publishing such a rule as regulation. *Id.* at 1107-08. Reliance on such an unpublished rule is illegal and represents an abuse of discretion. *Id.* at 1108.

In this case, the so-called "rule of thumb" relied upon by the contracting officer is not only unpublished, it is unwritten as well. Applying the reasoning of the *NI* decision to this case, the Federal Circuit should have found that reliance upon such an unwritten, unpublished rule of thumb (assuming such a rule exists) is an abuse of discretion and constitutes bad faith on the part of the contracting officer. There is simply no basis in the law for the "leniency" that the Court of Appeals used in this case. By failing to recognize this principle, the Court of Appeals raises considerable confusion surrounding the use of such unpublished rules of thumb.

D. The Rule of Thumb Has No Basis in Law or Regulation

As stated above, the Corps of Engineers and the contracting officer were without power to adopt an unpublished, unwritten rule of thumb affecting all contractors. Furthermore, the rule of thumb described is contrary to established law and regulations. As the trial judge stated, "the [contracting officer] cited no authority for his definition of cardinal change and . . . defendant's counsel was also unable to produce documentation for its witness' cardinal change theories." Petition at 44b.

The trial judge was unable to reconcile this rule of thumb with the case law regarding cardinal changes:

> Moreover, while no finite amount defines the scope of a cardinal change, the boundaries seem enormous. *Compare General Dynamics Corp. v. United States*, 218 Ct. Cl. 40, 56-57, 585 F.2d 457, 466 (1978) (finding a $100 million increase in a $60 million contract as within the scope of the contract) *with Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242, 255 (8th Cir. 1969) (deeming a treble rise in the cost of the contract as outside the scope of the contract).

Petition at 42b-43b. *Accord* J. Andrew Jackson & Steven A. Alerding, *Expanding Contracting Opportunities Without Competition*, 26 PUB. CONT. L.J. 205, 206-07 (1997) (noting that, while examining the magnitude of any changes in the type, duration, and costs associated with the contract work is appropriate in considering whether a change is a cardinal change, the deciding issue is whether the modification is of a nature that potential offerors could reasonably have anticipated under the changes clause). In short, "*no rule of thumb exists to measure what constitutes a cardinal change.*" *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 677 (emphasis added), *appeal dismissed*, 36 F.3d 1111 (Fed. Cir. 1994).

E. The Court of Appeals Failed to Apply Common Law Concepts of Good Faith in Deciding Whether the Asbestos Removal Fell Within the Original Scope of the Contract

The issue of whether a modification to a contract rises to the level of a cardinal change arises in two separate but related contexts. First, a modification made by the Government may bear such a tangential relationship to the original terms of the contract and intent of the parties as to rise to the level of a contract breach. Second, a government modification may be acceptable to the contractor but can still represent a cardinal change if it "change[s] the contract enough to circumvent the statutory requirement of competition." Petition at 12a

(citing *AT&T Communications, Inc. v. WilTel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993)).

Both the trial court and the Court of Appeals characterized a cardinal change as "a drastic modification beyond the scope of the contract." *See* Petition at 12a, 42b. The Court of Appeals failed, however, to apply this standard properly to the facts of the case and *sub silentio* disregarded the factual findings of the trial court.

The trial court focused on the scope of the contract as reflected by the expectations of the parties. To that end, the trial court paid close attention to the testimony of both the contracting officer and the other government witnesses, all of whom stated that the contract was intended to cover removal of all asbestos at the site:

> This Court notes, with interest, that while defendant strenuously argues that the Corps contract had not contemplated the complete abatement of all asbestos at the Raco site, *all* of defendant's witnesses testified to the contrary.

Petition at 27b n.24 (citations omitted) (emphasis in original).

The focus of the trial court was proper not only for purposes of determining whether such complete abatement rose to the level of a cardinal change, but also for examining whether the termination by the Government was made in good faith as defined by the common law. Under the common law, where one party has reserved a discretionary right under a contract, the exercise of that discretion is limited by the implied covenant of good faith and fair dealing and is bounded by the expectations of the parties. As one current Justice of this Court noted, while serving on the New Hampshire Supreme Court:

> [U]nder an agreement that appears by word or silence to invest one party with a degree of discretion in

> performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting.

Centronics Corp. v. Genicom Corp., 562 A.2d 187, 193 (N.H. 1989) (Souter, J.).[2] The issue then becomes whether a party's exercise of discretion violates the limits set by the intent of the parties.

The discretion referred to is discretion created within the terms of the contract, not discretion afforded to a party by virtue of its independent status as a government entity. Under the common law of contracts:

> A [party that possesses some measure of discretion under a contract] has an interest in maintaining the full range of discretionary action as agreed, and often bargained for, calling upon judges and juries to refrain from second-guessing amounting to ad hoc regulation. By contrast, the other party has an interest, also often bargained for, in securing some measure of protection from abuses of discretion by his contract partner. *Focusing on a discretion-exercising party's reasons for action, finding liability only when a party acts for a reason given up when entering the contract freely, tends to hold a discretion-exercising party to its voluntary undertakings without engaging in second-guessing or hidden regulation.* It protects one party's justified expectations that the other will act for expectable reasons in the relevant business context. This approach preserves a reasonable scope for discretion,

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[2] Justice Souter also noted that the breadth of discretion afforded under the contract, if sufficiently large, "can also raise doubt about the parties' intent to be bound." *Id.*

> rooting the limits on discretion in the parties' agreement.

Steven J. Burton and Eric G. Andersen, CONTRACTUAL GOOD FAITH—FORMATION, PERFORMANCE, BREACH, ENFORCEMENT 58 (1995) (emphasis added).

The question thus becomes whether the Government abused its discretion by terminating the contract for a reason given up when it entered the contract. As the trial court found, the parties intended that the scope of the contract encompass the removal of all the asbestos on the demolition site. The Government entered the contract without knowing the exact quantity of asbestos to be abated, but still intended for the abatement of *all* asbestos on site. Petition at 4b-5b, 27b n.24. The Government thereby gave up the opportunity to definitize the amount of asbestos to be removed. The Government could have and should have known the full extent of asbestos prior to contracting, but instead gave up that right to terminate for this reason by contracting with Krygoski to locate, abate, and remove all the asbestos from the site. Petition at 6b. It entered into a contract with clauses providing for variations in estimated quantities and changes. *See* Petition at 9b. These facts support the trial court's finding that the Government's decision to terminate the contract based on the amount of asbestos contained at the site represents an abuse of contractual discretion and constitutes bad faith on the part of the government.

Instead of addressing this issue, the Court of Appeals adopted a standard of leniency toward the Government, to be used whenever a reasonable inference exists of proper motive supported by the facts. Not only is there no basis in contract law for such a legal proposition, but also the Court's factual findings, upon which it purports to rely for its conclusion, have no support in the record.

The Court of Appeals held that it would "avoid a finding of abused discretion when the facts support a

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reasonable inference that the contracting officer terminated for convenience in furtherance of statutory requirements for full and open competition."[3] Petition at 15a. The Court of Appeals then turned this "reasonable inference" into a *factual finding* that the contracting officer in this case "terminated the contract to preserve full and open competition. He decided to avoid any prospect of prejudice to other bidders." Petition at 17a.

This statement by the Court of Appeals completely overlooked the factual findings made by the trial court, upon which the Court of Appeals should have relied unless such findings were clearly erroneous. Petition at 5a (relying on *Cooper v. United States*, 827 F.2d 762, 763 (Fed. Cir. 1987) and *Milmark Servs., Inc. v. United States*, 731 F.2d 855, 857 (Fed. Cir. 1984)). Those

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[3] The Court of Appeals seriously overlooked the distinction between governmental discretion created by statute and discretion reserved under the terms of a contract. The Court of Appeals appears to have adopted the "any rational basis" test, which has its foundation not in contract law but agency law under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (1994). *See, e.g., Brotherhood of Ry. & Airline Clerks v. Burlington Northern Inc.*, 722 F.2d 380, 381 (8th Cir. 1983); *American Hosp. Ass'n v. Schweiker*, 721 F.2d 170, 175 (7th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984) (both holding that agency conduct is arbitrary and capricious only when it lacks any rational basis).

The discretion granted under agency law, however, is created by the enabling statute. *See Heckler v. Chaney*, 470 U.S. 821, 834-35 (1985) (limits of discretion exist to the extent meaningful standards have been provided by Congress). But, in the contract, the discretion is created and limited by the terms of the contract to which the Government agreed. By relying on the former and ignoring the latter, the Court of Appeals disregarded the long-standing line of cases from this Court that place upon the Government the same obligations of a private party when it chooses to enter contracts. *See, e.g., United States v. Winstar Corp.*, 116 S. Ct. 2432, 2464-65 (1996) (Souter, J., for the plurality); *Lynch v. United States*, 292 U.S. 571, 579 (1934).

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findings were that the motivation behind the termination was not an interest in promoting competition, or a concern for whether the work fell within the original scope of the contract, but a simple application of an unwritten rule of thumb as to contract price. That rule of thumb was tied to the increase in the cost of the contract, without regard to whether the increase was or was not intended by the parties to fall within the scope of the contract. *See* Petition at 11b. In making this finding, the trial court relied on the testimony of the contracting officer himself, who said that: "In this case, the *whole* reason for the termination was a change in the neighborhood of $300,000 to a $400,000 contract. That constituted a cardinal change." *See* Petition at 44b (emphasis added).

The rule of thumb is clearly inconsistent with the intent of the parties as found by the trial court. The Government, by awarding the contract, gave up the right to terminate solely to get a better price for the work, so long as that work fell within the expectation of the parties to the contract.[4]

Cost is but *one* of several factors in determining whether a change exceeds the scope of the contract. Nevertheless, the Court of Appeals raised the possibility that any modification, however closely related to the work contemplated by the original contract, may require contract termination and re-procurement merely because of the expense involved in the change. Such a result is

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[4] "CICA [the Competition in Contracting Act] does not require a new competition for a modification that is deemed to be within the scope of the original competed contract. This 'exception' to CICA's competition requirement is not really an exception at all: CICA does not require a new competition essentially because the modification -- or, more accurately, the potential for the modification -- was included with the original competition." Jackson & Alerding, *supra*, 26 PUB. CONT. L.J. at 206-07.

inconsistent with the established common law requirement of good faith, resulting in yet greater uncertainty among government contractors as to their true obligations under government contracts.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 96-1236

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KRYGOSKI CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY OF THE PETITIONER TO THE OPPOSITION OF THE UNITED STATES TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioner Krygoski Construction Company has no parent corporation and has no nonwholly owned subsidiaries.

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2A NORMAN J. SINGER, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION §§ 47.23-47.25 (5th ed. 1992) 5

Petitioner Krygoski Construction Company ("Krygoski") hereby replies to the opposition of the United States to Krygoski's petition for a writ of certiorari.

ARGUMENT

A. The Panel Decision Conflicts with Existing Precedent and Adds to the Confusion Surrounding the Exercise of Government Contract Termination Clauses

In its opposition, the government attempts to downplay the conflict the panel decision creates with Supreme Court and Federal Circuit precedent. In addition, the government dismisses the confusion surrounding the permissible exercise of government contract termination clauses.

The government argues that the cases relied upon by Krygoski are inapplicable to this case because they involved indefinite quantities contracts with no minimum quantities. *See* Brief for the United States in Opposition ("Opposition") at 8 n.2. The government fails to recognize, however, that the requirement for consideration, which is the heart of the issue in this case, is present in all types of contract.

The contract in this case encompassed the complete demolition of a government missile site, including asbestos abatement. The asbestos abatement was stated as an indefinite quantity with unit prices. No minimum was stated, and all government witnesses testified the contract included all asbestos. Petition at 27b n.24. As the trial court found, the parties to the contract intended it to encompass the complete removal of asbestos from the missile site. *See, e.g.,* Petition at 45b. Consequently, the contract is akin to a requirements contract like the contract in *Torncello v. United States*, 681 F.2d 756 (Cl. Ct. 1982) (*en banc*). Having contracted with Krygoski

for all asbestos abatement, the government could not separately contract with anyone else for the same task.

By terminating the contract, the government took away from Krygoski not only the asbestos abatement, but also all other aspects of the contract. By allowing the government to terminate the contract at any time, in the absence of any change in circumstances, the Federal Circuit panel essentially made illusory the government's promise to use Krygoski for the demolition, including all asbestos abatement. By upholding the enforceability of such a contract, the Federal Circuit decision is in conflict with the Supreme Court case law set forth in the Petition. *See* Petition at 22-23.

The panel decision also conflicts with other decisions of the Federal Circuit. The decision is clearly in conflict with *Torncello*[1] and *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988), the only other Federal Circuit decision to analyze the issue of consideration. The government attempts to distinguish *Maxima Corp.* on the grounds that it involved a government attempt to terminate the contract retroactively after completion of the contract. A review of the *Maxima Corp.* decision, however, reveals that its use of the *Torncello* "changed circumstances" test was in no way linked to that particular fact of the case. *See id.* at 1552-53; *see also* Petition at 20 n.10 (criticizing the panel's treatment of *Maxima Corp.*).

The government's attempt to portray the case law in this area as "uniform" in light of the decisions in *Salsbury Industries v. United States*, 905 F.2d 1518 (Fed.

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[1] *Torncello* was considered *en banc* by the Court of Claims, the predecessor court to the Federal Circuit. As the trial court noted, decisions of the Court of Claims were adopted as precedent by the Federal Circuit and can be overruled by the Federal Circuit only when sitting *en banc*. *See* Petition at 21b.

Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991), and *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578 (Fed. Cir. 1995), is incorrect. Trial courts have continued to apply *Torncello* inconsistently. *See, e.g., Pacificorp Capital, Inc. v. United States*, 25 Cl. Ct. 707, 719-21 (1992) (finding the existence of changed circumstances justified the government's contract termination). The court in *Pacificorp Capital* mentions *Salsbury* only briefly and does not suggest that *Salsbury* changed the fundamental holding in *Torncello*. *Id.* at 721; *see also Government Systems Advisors, Inc. v. United States*, 21 Cl. Ct. 400, 409-410 (construing *Salsbury* as merely an extension of the *Torncello* changed circumstances test), *vacated on other grounds*, 25 Cl. Ct. 554 (1990).

Even after the decision in *Caldwell & Santmyer* and the panel opinion in this case, the circuit law remains confusing, and commentators still "wonder whether this mess will ever be straightened out." Petition at 17g. The trial judge in this case recognized the continued confusion on this issue and requested guidance on the conflicting case law. *See* Petition at 20b n.15.

Finally, although the exclusive jurisdiction of the Federal Circuit prevents a direct conflict,[2] the panel decision is at least inconsistent with the interpretation of *Torncello* by other circuits. *See, e.g., Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1405 (9th Cir. 1993) (relying on *Torncello* for the proposition that "the government cannot reserve to itself an unlimited right to escape its contractual obligations 'without rendering its promises illusory and the contract void'"); *Edo Corp. v. Beech Aircraft Corp.*, 911 F.2d 1447, 1452-53 (10th Cir.

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[2] As Krygoski pointed out in its Petition, no circuit conflict can exist on this issue because the Federal Circuit has exclusive jurisdiction to hear appeals from the Court of Federal Claims and the various boards of contract appeals. *See* Petition at 18 n.8.

1990) (upholding the trial court's application of the changed circumstances test of *Torncello* but ruling that such a finding was unnecessary because the termination clause, unlike the one in *Torncello*, was supported by consideration). The conflict and confusion both within and without the Federal Circuit on the proper application of the changed circumstances test justify granting the petition in this case.

B. CICA Does Not Apply to Convenience Terminations Nor Does It Resolve the Confusion Surrounding the Issues Raised in *Torncello*

The government also points to the panel's reliance on the Competition in Contracting Act of 1984, Pub. L. No. 98-369, Tit. VII, 98 Stat. 1175 ("CICA"), and argues that the requirement for "full and open competition" contained in CICA supersedes the changed circumstances requirement of *Torncello*. Opposition at 10-11. Frankly, Krygoski considers CICA to be a complete "red herring" with respect to the issues in this case. The termination of contracts for the convenience of the government is nowhere addressed in CICA. In their reliance on the statute, both the Federal Circuit panel and the government misconstrue the purpose and effect of CICA on the contract at issue.

CICA was enacted in 1984 to "establish an absolute preference for competition and to provide more flexibility in contracting." *See* 130 Cong. Rec. S5025 (daily ed. Apr. 30, 1984) (statement of Sen. Cohen). Prior to the passage of CICA, the government was required to use "formal advertising" in awarding its contracts. The government invited contractors to submit sealed bids for work, and the contract was awarded to the low bidder. The government could not, except under limited exceptions and with written justification, conduct negotiations with contractors instead of requesting bids, even when such negotiations were conducted competitively.

CICA "remove[d] the restriction from—and the written justification required for—competitive proposal procedures and place[d] them on par with sealed bid procedures." H.R. REP. NO. 861, 98th Cong., 2d Sess., (1984), *reprinted in* 1984 U.S.C.C.A.N. 2109, 2110. CICA made no changes to formal advertising except to change the phrase to "sealed bids." *Id.* No suggestion has ever been made that the competition for the contract awarded to Krygoski, in which seven other bidders participated, and which was essentially identical to the "formal advertising" process in effect prior to CICA and used in *Torncello*, was anything but "full and open."

Merely because CICA promotes full competition prior to the award of a contract does not mean that the government now possesses *carte blanche* to cancel existing contracts when it perceives an opportunity to conduct still further competition. The citations to the contrary in the Federal Circuit's opinion and quoted in the government's opposition do not support the propositions for which they are cited. For example, nothing in 10 U.S.C. § 2305 (1994) or 48 C.F.R. 1.602-2 (1997) supports the proposition that CICA may compel termination and reprocurement if "a contracting officer discovers that bid specifications inadequately describe the contract work." The closest the statute comes to this proposition is a statement that a contracting officer may cancel a *solicitation* at any time. Such a cancellation occurs prior to contract award; the statute does not speak at all to termination after award. Such silence with regard to post-award cancellation could just as easily be read as prohibiting such conduct, since it is not specifically allowed. *See* 2A NORMAN J. SINGER, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION §§ 47.23-47.25 (5th ed. 1992) (describing the doctrine of *expressio unius est exclusio alterius*, or "the expression of one thing is the exclusion of another").

At best, CICA has but indirect relevance to this case. The Federal Circuit and the various protest fora (e.g., the

General Accounting Office and the General Services Board of Contract Appeals) have limited when existing contracts can be modified. If a proposed modification falls outside the scope of the original competed contract, then it constitutes new work and must be competed as required by CICA. *See, e.g,, AT&T Communications v. WilTel*, 1 F.3d 1201, 1205 (Fed. Cir. 1993).

The trial court went to great lengths to consider what was contemplated by the original competition and the contract. *See* Petition at 22b-27b. It found, consistent with the reasoning later set out in *WilTel*, that abatement of all asbestos, whether known or unknown at the time of contract award, was contemplated.

The Federal Circuit did not overturn the finding of the trial court or conclude that termination was necessary under *WilTel* or CICA. Rather, the panel said that it would apply a lenient review standard should the contracting officer choose to do so. CICA does not provide any basis for this lenient review standard or the termination for convenience in this case.[3]

C. The Federal Circuit's Lenient Review of the Contracting Officer's Decision for Bad Faith or Abuse of Discretion Does Not Ensure That the Government's Promise is Supported by Consideration

The government argues that the termination for convenience clause does not render the contract illusory because its application is limited by the bad faith or abuse of discretion test. This is precisely the argument

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[3] Despite the implications of the panel decision, the decisions in *Salsbury* and *Caldweil & Santmyer* contain no references whatsoever to CICA. The passage of CICA in 1984 thus cannot explain the disparate results between *Torncello* and *Salsbury*. *See also Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988) (applying, post-CICA, the changed circumstances test of *Torncello*).

rejected by the plurality in *Torncello*. Petition at 30f-32f. As the *Torncello* plurality stated:

> It is bootstrapping to say that the government's claimed power of unlimited exculpation is saved by the limits on its discretion. Those limits must be derived from something else, but under the government's view there is nothing else.

One of the concurring judges in *Torncello* believed that the bad faith and abuse of discretion tests could constitute limits sufficient to satisfy the requirement of consideration. Petition at 36f. To the extent that the two opinions differ, it appears they do so because the plurality, referring to the requirement that bad faith be demonstrated by "well-nigh irrefragable proof," considers this limit too difficult to prove to be meaningful. The concurring opinion by Judge Davis would not define bad faith and abuse of discretion so narrowly as to make those tests meaningless.

To the extent that the government gains any solace or support from Judge Davis' concurrence, one can speculate as to whether Judge Davis would approve the "lenient test" applied by the panel in this case. Proving an abuse of discretion under a "lenient" standard is arguably as difficult as proving bad faith or abuse of discretion by "well-nigh irrefragable proof." Faced with this construction of the bad faith and abuse of discretion tests, Judge Davis might well have joined the plurality in *Torncello* in finding a "lenient" limit to be no limit at all.

D. The Fundamental Issue in This Case is the Meaning of the Convenience Termination Clause

The government's opposition contends that Krygoski should not be heard to complain because the termination clause was part of the "bargain" it made with the government. Opposition at 9. The whole point of this case, however, is an attempt to define, by interpretation,

the meaning of the bargain to which the government refers.[4]

Krygoski maintains that the bargain did not permit termination for matters contemplated by the contract. As found by the trial court, all that happened was that Krygoski performed the space by space, structure by structure, site inspection required by the contract and learned what should have already been known to the Government—that there was more and different asbestos present then previously actually known.

Krygoski did not bargain to lose the benefit of that bargain by its performance. The government should have known about the asbestos floor tile before contracting, just as the government should have known the published price for copper in *Colonial Metals v. United States*, 494 F.2d 1355 (Ct. Cl. 1974). Terminating for a reason which should have been known is an abuse of discretion, especially where the contract recognizes the possibility in the first place. Why else have the inspection clause? *See* Petition at 26b-27b. A *pre-existing* circumstance cannot constitute a *changed* circumstance. The only thing that changed was the extent of actual knowledge, not the circumstances of the work. Krygoski did not bargain for the government to possess such an unlimited right of repudiation.

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[4] To suggest that the termination clause was part of a "bargain" struck between the parties is something of a stretch. There was no bargaining; Krygoski submitted a sealed bid in response to an invitation which, pursuant to regulations, mandated the clause. The same can be said in reply to the government's argument that Krygoski was "willing" to enter such contracts even after the termination. *See* Opposition at 9 n.3.

E. The Present Dispute Is an Appropriate Case for Resolution

The government argues that this is not an appropriate case for review because the panel below held that "[t]he trial court improperly found no change of circumstances sufficient to justify terminating the contract for the Government's convenience." Opposition at p.11. This quotation has been taken out of context. The preceding sentence states: "The trial court erred by invoking and relying upon the *Torncello* plurality test." Petition at 16a. The two sentences read in conjunction make clear that what the panel found "improper" was not the trial court's *finding*, but the *application* of the *Torncello* plurality test.

Continuing to provide incomplete quotations, the government states that "the court further noted that 'arguably the Government's circumstances had sufficiently changed to meet even the *Torncello* plurality standard.'" Opposition at 11. Omitted from the government's brief is the rest of the panel's statement: "this court declines to reach this issue . . . ." Petition at 16a-17a. It is this decision—the decision to permit the government to terminate its contract with Krygoski without reviewing the termination against the *Torncello* changed circumstances test—that Krygoski challenges in its petition.

The work of the courts below has created a record which makes this case an appropriate vehicle to review the issues presented. The trial court fully considered the facts of the case and found that the changed circumstances test of *Torncello* had not been satisfied.[5]

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[5] The Federal Circuit itself recognized that "[t]he trial court thoroughly analyzed the factual circumstances and legal principles of this case. Its careful work properly framed the issues for this appeal." Petition at 5a.

The Federal Circuit declined to apply the changed circumstances test, holding as a matter of law that *Torncello* did not apply to this case. Should this Court rule that the changed circumstances test of the plurality in *Torncello* should have been applied, the factual findings of the trial court support a reversal of the Federal Circuit.[6] Petitioner maintains that the errors of law by the Federal Circuit would likely result in a different outcome here.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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April 16, 1997

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[6] Likewise, the record supports a rejection of the lenient standard used by the Federal Circuit to evaluate whether the contracting officer abused his discretion, thereby justifying a reversal on that ground as well.

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No. 96-1236

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KRYGOSKI CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

SUPPLEMENTAL BRIEF OF THE PETITIONER IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioner Krygoski Construction Company has no parent corporation and has no nonwholly owned subsidiaries.

Petitioner Krygoski Construction Company ("Krygoski") submits the following supplemental brief in support of its pending petition for a writ of certiorari. The rules of this Court permit the filing of such a supplemental brief to "call[ ] attention to new cases, new legislation, or *other intervening matter not available at the time of the party's last filing.*" S. Ct. R. 15.8 (emphasis added).

The purpose of this brief is to call the Court's attention to recent analysis and criticism of the Federal Circuit's decision. The April 14, 1997 issue of the *Federal Contracts Report* contains an in-depth review of the lower court's opinion written by two experienced government contract practitioners. This issue was received by counsel for petitioner on April 16, 1997, after the filing of petitioner's reply brief. A copy of the review is attached hereto as an appendix.

The analysis echoes and supports a number of the points raised in the petition and Krygoski's reply brief. First, it recognizes the confusion that surrounds the proper application of the "changed circumstances" doctrine described in *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982) (*en banc*). *See* App. 6h ("For the most part, the courts and boards of contract appeals have struggled with the proper scope and application of the holding in *Torncello* . . . .").

Closely reviewing the plurality and concurring opinions in *Torncello*, the analysis recognizes that a majority of the Court of Claims adopted the changed circumstances test "in some form." *See* App. 22h. As an *en banc* decision, the *Torncello* holding cannot be overruled by a panel of the Federal Circuit. App. 15h.

Second, the review recognizes that the panel decision below raises a serious concern as to the absence of consideration in, and the consequent unenforceability of, government contracts containing a termination for convenience clause. *See* App. 21h ("Does *Krygoski* leave us with any meaningful limits on the government's rights to

terminate for convenience? Apparently not.") The only theoretical limit that remains to the government's power to terminate—namely, that it cannot act in bad faith or abuse its discretion—is "so remote, a contractor could not realistically expect to prove it had been transgressed." *See* App. 21h.

The analysis also criticizes the Federal Circuit's "novel" reliance on the Competition in Contracting Act of 1984, Pub. L. No. 98-369, tit. VII, § 303A, 98 Stat. 1175, 1178 ("CICA"). The authors confirm that, since the passage of CICA in 1984, no other decision has linked CICA with the resolution of the *Torncello* issue. App. 16h. They point out that "neither the phrase 'termination for convenience,' nor the concept of a unilateral right to walk away from an agreement at minimal cost, appears anywhere in CICA." App. 17h. Finally, they note that the "legal innovations which *Krygoski* attributes to CICA are not really new at all. Without exception, CICA simply did not alter the law in the ways the opinion suggests." *Id.*

With respect to the *Krygoski* panel's invocation of the "cardinal change" doctrine, the analysis notes that the panel properly described the law of cardinal changes. However, the analysis goes on to criticize the Federal Circuit's application of the cardinal change doctrine under the facts of the case as found by the trial court. Because a significant amount of asbestos was expected to be uncovered by the parties to the contract, "the presence of additional asbestos should have surprised no one." App. 20h. The mere change in the amount of asbestos to be removed is not the sort of contract modification that "goes beyond the scope of the original competition." *See* App. 19h. To suggest that such expected changes are beyond the scope of the original contract "is a hard pill for practitioners to swallow." *See* App. 20h.

Finally, the analysis recognizes that an unlimited right of the government to terminate a contract through the use of a termination clause is contrary to "the current trend to 'commercialize' government procurement." *See*

App. 25h. The analysis recommends a return to the changed circumstances test of *Torncello* as "a better starting point" than the "cardinal change" standard of the Federal Circuit's opinion below. *See* App. 23h.

The conclusions of the authors clearly support granting the petition for certiorari in this case. In their own words:

> *Krygoski* is not persuasive. It effectively overrules *Torncello*, although the panel did not have this authority. The "cardinal change" test is no improvement over the "changed circumstances" test, and its basis in CICA is spurious. Finally, *Krygoski* even misapplies the "cardinal change" doctrine it invokes.

App. 20h. For the reasons set forth in the analysis, as well as those previously set forth by petitioner, this Court should grant the petition for a writ of certiorari.

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APPENDIX

Joseph J. Petrillo & William E. Conner, *Convenience Terminations After* Krygoski, 67 Fed. Cont. Rep. (BNA) 447 (1997).

I. Introduction

One of the unique aspects of federal contracts is the government's ability to terminate a contract for its "convenience." The limits to place on this broad power have perplexed federal courts and boards of contract appeals for decades, most recently in the U.S. Court of Appeals for the Federal Circuit's decision in *Krygoski Constr. Co. Inc. v. U.S.*[1]

The plaintiff has asked the U.S. Supreme Court to review the ruling in Krygoski. If the court decides to hear the case, its opinion could change the entire legal landscape of convenience terminations. Review is not likely to be granted, however, and so contractors may have to turn to other avenues of redress.

The notion that the federal government needs extraordinary flexibility in its contractual obligations, including the ability to end them without incurring breach damages, is an old one. Although its precise origins are unclear, the termination for convenience concept appears to date to the Civil War in connection with the need to bring a quick end to wartime production.[2] It was alluded to over 150 years ago in the U.S. Supreme Court's decision in *U.S. v. Corliss Steam-Engine Co.*, which recognized the need for military departments to modify, suspend or settle contracts for armaments due to "contingencies," including the rapid pace of technological improvements.[3]

Following World War II, the termination for convenience concept was incorporated into peacetime, non-military contracts as well.[4] When the contractor was terminated for convenience, instead of receiving damages calculated upon common law breach of contract, it was lim-

ited to recovery of "costs incurred, profit on work done and the costs of preparing the termination settlement proposal. Recovery of anticipated profit [was] precluded."[5]

Termination for convenience also evolved into a mechanism to reduce government liability for breach of contract. Through the doctrine of "constructive" termination for convenience, courts and boards assumed that under certain circumstances, the government would have terminated a contract for convenience, although it did not actually do so. Thus, if a termination for default was later found improper, it was converted into one "for the convenience of the government." As a result, the government was insulated from paying breach damages in situations where a private party would have to pay them.

In 1963, the U.S. Court of Claims held that termination for convenience was a "deeply ingrained strand of public procurement policy."[6] It was considered so consequential to modern government contracts that under the "Christian doctrine," the termination for convenience clause will be read into a contract by operation of law if contracting officials omit it.[7] At about the same time, the termination for convenience clause also evolved into an exculpatory provision which insulated the government from breach damages when it wrongfully terminated a contract for default.[8] What had started as a way to ease the transition from war to peace had become, without any action by Congress, almost universal immunity from damages for breach of contract.

II. Development of Limitations on the Government's Ability to Terminate Contracts for Its Convenience

A. The Pre-*Torncello* Era

Prior to June 1982, various judicial and administrative decisions held that a contractor could successfully

prevail in challenging a termination for convenience only by demonstrating bad faith or a clear abuse of discretion on the part of government officials.[9] An argument based upon bad faith, however, carries an extremely heavy burden of proof. Federal government officials enjoy a heavy (but presumably rebuttable) presumption of acting in good faith.[10] Overcoming this presumption means that "well-nigh irrefragable proof"[11] must demonstrate otherwise. Not surprisingly, a case founded upon bad faith was (and remains) seldom successful.

There is a good deal of controversy about what is necessary to show an abuse of discretion in a contracting context. This standard is sometimes equated with a finding that a government official's actions were "arbitrary and capricious." In some cases the standard is so strictly applied that it is either the equivalent of bad faith or it means showing that there is no reasonable basis for the government's decision.[12]

The Court of Claims' opinion in *Colonial Metals Co. v. U.S.*,[13] illustrates the problems faced by contractors in the early termination for convenience cases. There, the Navy awarded a contract to Colonial Metals Co., a copper dealer operating on the secondary market, for a large, but disputed, amount of copper ingots. Colonial ordered the required amount of ingots, but one month later, the Navy terminated the contract for convenience in order to buy the copper from another supplier at a much lower price. Colonial's claim for damages failed at both the Armed Services Board of Contract Appeals ("ASBCA") and the Court of Claims. The court ruled that where "the contracting officer knew of the better price elsewhere when he awarded the contract to plaintiff—in the absence of some proof of malice or conspiracy against the plaintiff [citation omitted]—[this] means only that the contract was awarded improvidently and does not narrow the right to terminate."[14]

Thus, the doctrine of convenience termination seemed to give the government a unilateral right to back out of contracts—even retrospectively—at any time, for any reason, and without paying damages. Under these circumstances, a government contract began to look like a very different specimen from what the common law regarded as a binding agreement. The government's obligations had become so diluted, that it seemed the standard government contract might fail for lack of consideration.[15]

B. The *Torncello* Case

However, in 1982 the Court of Claims changed the landscape of convenience termination litigation. In *Torncello v. U.S.*,[16] a plurality opinion by three of the six judges held that for a termination for convenience to be valid, there must exist some change in the circumstances or in the parties' expectations after award to warrant the termination. The other three judges concurred in the result, but not in the reasoning. As we shall see, the fact that *Torncello* was a plurality, rather than a majority, opinion has contributed to the misunderstanding and misapplication of the court's ruling.

Briefly, in *Torncello* the Navy entered into a one-year, 12-item contract awarded on an "all or none" basis with Soledad Enterprises Inc. ("Soledad")[17] for grounds maintenance and refuse removal services for six Navy family housing facilities in San Diego. Although its price was advantageous for the contract as a whole, Soledad charged a very high rate for one of the twelve items, pest control services. The Navy never ordered the pest control services from Soledad, choosing to perform the work more cheaply in-house. The contract was subsequently terminated for default, and Soledad appealed the termination to the ASBCA.

1. The ASBCA Decision

Soledad argued before the Board that its contract was a requirements contract obligating the government to procure all of the services required of the type covered under the contact from Soledad. Soledad contended that by obtaining pest control services from the Navy's own Department of Public Works, the Navy had breached the contract to procure such services only from Soledad. The Board, however, found it "unnecessary" to rule on this point, and held that even if it was a requirements contract, the Navy's failure to order work under the contract did not constitute a breach because the Navy could have terminated the contract for convenience. Thus, the Navy's failure to abide by the terms of its contract with Soledad constituted a "constructive" termination for convenience.[18] Further, because Soledad's contract incorporated the Federal Acquisition Regulation's ("FAR") "short form" termination for convenience clause,[19] which expressly limited recovery to payment for services rendered only up to the time of termination—and as the Navy had not ordered pest control services from Soledad—the Board held that Soledad was not entitled to any recovery.[20]

2. The Court of Claims Decision

On appeal to the Court of Claims, the court heard the case *en banc* "because of the exceptional importance of the legal issues involved."[21] Three of the six judges held that Soledad's contract was a requirements contract, that the Navy's failure to order work under the contract was a breach, and that the Navy could not rely upon the termination for convenience clause to escape liability. Importantly, this "plurality opinion" by Judges Bennett, Kashiwa and Smith observed that if the government's power to terminate contracts for its convenience were unlimited, then contracts would be illusory for lack of consideration:

> We note as one of the elementary propositions of contract law that a party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contact void, and we question if the government's termination for convenience clause should be construed that broadly.[22]

The plurality found the solution to this conundrum in the history of the clause. The opinion concluded that the clause, properly invoked, was a tool to extricate the government when there was a change in circumstances subsequent to award (e.g., such as the end of hostilities in a wartime contract):

> [W]e must read the termination for convenience clause in Soledad's contract to require some kind of change from the circumstances of the bargain or in the expectations of the parties. These are just the historical limits on the clause as they have developed from *Corliss*.[23]

The court's opinion also overruled *Colonial Metals Co. v. U.S.*[24]

As noted, the three other sitting judges of the court concurred in the result, but each wrote a separate opinion. This has led to confusion and controversy, as discussed below.

C. Application of *Torncello*

For the most part, the courts and boards of contract appeals have struggled with the proper scope and application of the holding in *Torncello*, largely due to the fact that the case's forcefulness is diminished by its plurality, rather than majority, opinion, and confusion over precisely what *Torncello* teaches. As a result, two views have emerged from *Torncello* regarding convenience terminations. The broad view of *Torncello* limits the government's use of the termination for convenience clause to situations in which the circumstances surrounding the

parties' bargain at the time of contract award change unexpectedly. Under the narrow view of *Torncello*, absent bad faith or abuse of discretion, the government apparently enjoys unfettered discretion to terminate a contract for convenience, except that it may not terminate for convenience a requirements contract merely to avoid liability for breach.

According to Professor Emeritus John Cibinic, "*Torncello* has been cited for various legal propositions in 90 board of contract appeals decisions, 46 Claims Court and Court of Federal Claims decisions, and 12 Federal Circuit decisions."[25] These cases, however, mostly fall into a few categories.

1. Improper Diversion Under Requirements Contracts

Torncello involved a requirements contract. Therefore, it has stood for the proposition that when the government diverts to another contractor services to be provided under a requirements contract, there is a breach of contract, and the contractor is entitled to an award of lost profits.[26]

2. Improvidently Awarded Contracts

Another area where *Torncello* has been influential is in identifying when the government can use its convenience termination power to exit an improvidently awarded contract. In *Nationwide Roofing & Sheet Metal Co. Inc. v. U.S.*,[27] the Claims Court, relying on *Torncello*, held that the government could properly utilize the termination for convenience clause to cure a defective contract award. The Air Force planned to award a contract for roof repair and replacement to the lowest bidder. That bidder, however, had submitted its bid bond guarantee on the wrong form, and the contracting officer determined that this deficiency rendered its bid nonresponsive. He made award to the second-lowest bidder, and the

low bidder filed an agency-level protest. The Air Force sustained the protest and terminated the contract for convenience, awarding the contract to the low bidder. The terminated contractor protested to the General Accounting Office, but lost there. It then filed suit in the Claims Court, arguing that under *Torncello* the court should invalidate the convenience termination because the government "knew or should have known" that the low bid was responsive all along. The court disagreed, holding that it was consistent with *Torncello* to "utiliz[e] the termination for convenience clause to limit the government's liability and to correct an improper contract award in order to preserve the integrity of the competitive procurement process."[28]

Somewhat similarly, in 1989 the Claims Court upheld a convenience termination resulting from a court decision regarding a bid protest in *Salsbury Indus. v. U.S.*[29] In *Salsbury,* the contractor brought a breach of contract action after the Postal Service terminated the contract for convenience to comply with a district court injunction requiring it to award the contract to a previously disqualified offeror or resolicit the procurement. In sustaining the ensuing convenience termination, the *Salsbury* court explained that:

> *Torncello* only requires that the events that provoke the government's conclusion that termination is in its best interests be unexpected, *i.e.*, inconsistent with the assumption of the parties when they entered the contract. It does not require that the events also not be reasonably foreseeable to the parties.[30]

Salsbury appealed to the U.S. Court of Appeals for the Federal circuit ("CAFC" or "Federal Circuit"), which affirmed, but on broader grounds. The appellate court read *Torncello* narrowly as going no further than Chief Judge Friedman's brief concurring opinion: "*Torncello* has nothing to do with this case. It stands for the unre-

markable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause."[31] This summary follows most closely the laconic concurring opinion of Chief Judge Friedman, discussed later in this analysis.

The *Salsbury* court's explanation of *Torncello* received favorable treatment in *Caldwell & Santmyer Inc. v. U.S.*[32] When errors in the low bid permitted its withdrawal, the contract went to the second low bidder, Caldwell & Santmyer. This bid, however, also had the same errors as the low bidder, i.e., the omission of certain equipment. Accordingly, the contracting officer decided to terminate the contract for convenience and resolicit the work. Caldwell & Santmyer pursued its claim for breach damages to the Federal Circuit, which ruled that "*Salsbury* teaches that bad faith . . . is a prerequisite for a *Torncello* claim."[33]

However, in *OAO Corp.*,[34] the General Services Board of Contract Appeals ("GSBCA") invalidated a termination for convenience where, following a bid protest, the government had entered into a settlement agreement with a protester to terminate the awardee's contract. The Board held that the use of the termination for convenience clause solely to avoid litigation was improper, and reinstated the original contract.

3. Convenience Termination as Damage Avoidance

Two years after the Court of Claims decided *Torncello*, the Claims Court[35] issued its opinion in *Municipal Leasing Corp. v. U.S.*.[36] There, the Air Force had entered into a "lease to ownership" contract with Municipal for computer terminals. The contract incorporated an availability of funds clause which stated that

option exercise was predicated on the availability of funds, but that the Air Force "shall use its best efforts to obtain appropriations of the necessary funds to meet its obligations and to continue this contract in force."[37]

Ultimately, the Air Force notified Municipal that it would not be exercising the second option year of the contract due to an unavailability of funds. Municipal challenged the Air Force's actions, arguing that the Air Force had not used its "best efforts" to obtain contract funding. The government contended that the Air Force had acted properly as funds were unavailable, and that the nonrenewal of the contract was proper as a constructive termination. The Claims Court determined that the Air Force had not used its best efforts to obtain contract funding, but had decided that the contract was no longer necessary—and simply did not seek funds to renew the contract for the second option year.

The court also determined that the Air Force intended to repair existing computer terminals rather than buy the Municipal terminals, an option that the Air Force had apparently considered and rejected prior to contracting with Municipal. Accordingly, the court held for Municipal, stating that "[t]he termination for convenience clause will not act as a constructive shield to protect [the government] from the consequences of its decision to follow an option considered but rejected before contracting with plaintiff."[38]

In *Maxima Corp. v. U.S.*,[39] the Environmental Protection Agency ("EPA") awarded Maxima Corp. a fixed-price, indefinite quantity contract for typing, photocopying, editing, and related services. The contract consisted of a base year and two one-year options. The amount of work ordered by EPA, however, continually fell far short of the minimum amounts specified in the contract. Prior to the end of the base year, EPA decided to replace Maxima's contract with a cost reimbursement

contract. The parties entered into an agreement whereby Maxima would perform for an additional month beyond the first year, and then enter into a new cost-plus-fixed-fee contract.

EPA, however, did not order any work under the contract after completion of the additional month. One year later, EPA informed Maxima that the contract had been constructively (and retroactively) terminated for convenience based upon EPA's failure to order the contractual minimum during the term of the first contract. On appeal, the Department of the Interior Board of Contract Appeals held that EPA was only liable for the value of services actually ordered and received.[40] Maxima appealed to the Federal Circuit.

Interestingly, on appeal the government argued that EPA's failure to order the minimum level of services was demonstrative of *Torncello's'* "changed expectations" rule warranting convenience termination.[41] The court, however, held that the termination for convenience clause could not be applied retroactively to cure the breach.

The Claims Court has similarly declined to enforce an exculpatory provision of a surplus sales contract after a material breach by the government, holding that limiting liability to a refund of the purchase price paid would permit the government to rescind the contract at will and without penalty. The court held that enforcement of the exculpatory provision in that circumstance would result in an illusory contract, and granted the contractor anticipatory profits.[42] The Court of Claims had previously reached the same conclusion under yet another surplus sales contract with an identical exculpatory provision.[43]

4. Pre-Existing Intent

Tamp Corp.[44] is the rare case in which there was sufficient evidence of the government's intent. There, the Board held that the Navy's termination for convenience

was improper because the contracting officer had abused his discretion by intending to terminate the contract at the time he entered into a contract extension. The Navy elected not to exercise its option under a contract for mess attendant services at Navy dining facilities in Hawaii, but when award of a follow-on contract was delayed, sought a one-month extension with Tamp. However, Tamp desired a three-month extension, and the parties ultimately settled on a two-month extension. Subsequently, the contracting officer awarded the follow-on contract to another vendor and terminated Tamp's contract one month into the extension. Tamp challenged the termination at the ASBCA, and the Board, citing *Torncello*, sustained Tamp's appeal. The Board held that the contracting officer's "undisclosed intention" to terminate the contract when he entered into the extension "made a mockery of his ostensibly reluctant assent to a two month, rather than a one month, extension."[45] The Board explained that:

> The opinion for the court in *Torncello* was confined to the proposition that the Government cannot employ the Termination clause to end a requirements contract solely to obtain a better price from a different source, of both of which the Government had knowledge when it entered into the contract. However . . . the Government may not use the Termination clause to terminate a contract when it had the intention of later terminating at the time it entered the contract.[46]

The evidence of intent cited by the opinion is the hearing transcript, suggesting that the contracting officer made this damaging admission in his testimony. The Board sustained Tamp's appeal and remanded the matter to the parties to negotiate a settlement.

III. The Erosion of Limitations on the Government's Power to Terminate for Convenience

A. The *Krygoski* Case

Although the *Torncello* doctrine began to unravel almost as soon as it was created, the most serious challenge to it comes from a recent decision by the Federal Circuit. This ruling appears to repudiate the *Torncello* plurality's "changed circumstances" test for an uncertain substitute.

Krygoski Construction Co. submitted the low bid ($414,696), and was awarded a contract by the U.S. Army Corps of Engineers for demolition of two buildings at an abandoned Air Force facility. Based on blueprints of the buildings and on its own survey, the Corps estimated that the buildings contained 1,600 linear feet of asbestos pipe insulation and 650 square feet of asbestos tank and duct insulation. There were contract line items, with associated prices, for removal of each.

Prior to commencing performance, Krygoski conducted its own survey of the buildings and discovered additional asbestos present in the floor tiles and roof insulation in both buildings, which had been heavily vandalized. Krygoski proposed to remove this additional asbestos at the unit price for removing the tank and duct insulation under the contract pursuant to the contract's Variation in Estimated Quantities clause. The Corps calculated that removal of the additional asbestos contained in the floor tile would cost about $320,000 at the offered unit price.

The contracting officer considered a price increase of such magnitude (33 percent of the total contract price) to be a cardinal change, and instead terminated the contract for the convenience of the government. The Corps revised its specifications to include removal and disposal

of the additional asbestos, and resolicited the contract. Krygoski did not submit the low bid in this second competition.

Krygoski filed suit in the U.S. Court of Federal Claims ("COFC"), alleging that the Corps' convenience termination was a breach of contract. The COFC, relying upon *Torncello's* changed circumstances test, held that the government had improperly terminated Krygoski's contract, or, alternatively, had abused its discretion in terminating the contract.[47] As the court observed:

> The Government, however, in maintaining its current position that the bad faith/abuse of discretion standard is still the correct legal standard, conveniently overlooks [the] series of cases that apply the *Torncello* rule. Instead, it focuses almost exclusively on the *Salsbury* case, decided in 1990, which it believes reestablishes the bad faith/abuse of discretion standard as the exclusive standard to apply in these termination for convenience cases.[48]

The court awarded Krygoski damages, including anticipatory lost profits, and the government appealed tc the Federal Circuit.

On appeal, the CAFC reversed, concluding that the trial court committed an error of law by applying *Torncello's* changed circumstances test:

> The trial court erred by invoking and relying upon the *Torncello* plurality test. The trial court improperly found no change of circumstances sufficient to justify terminating the contract for the Government's convenience. Although arguably the Government's circumstances had sufficiently changed to meet even the *Torncello* plurality standard, this court declines to reach this issue because *Torncello* applies only when the Government enters a contract with no intention of fulfilling its promises.[49]

The Federal Circuit's opinion in *Krygoski* begins with a recitation of the history and evolution of the termination for convenience clause. The CAFC next discusses *Torncello*. Declaring that "[d]espite the adequate justification to overrule *Colonial Metals* under the existing *Kalvar* ["bad faith"] test, a plurality of judges in *Torncello* proceeded to articulate in dicta a broader test for gauging the sufficiency of a convenience termination."[50]

Determining that a termination for convenience is appropriate to prevent the government from entering into a cardinal change to the contract, the CAFC held that the contracting officer did not act in bad faith or abuse his discretion in terminating and resoliciting Krygoski's contract. Thus, the Federal Circuit reversed the COFC and remanded the case.

B. Was *Krygoski* Correctly Decided?

The first thing to note about the decision in *Krygoski* is that it was issued by a panel of the Federal Circuit. As such, it cannot overrule an *en banc* decision. *Torncello*, however, was decided by the Court of Claims, the predecessor court to the Federal Circuit, in an *en banc* decision.[51] Thus, whatever *Torncello* stands for, *Krygoski* cannot overrule it. The opinion in *Krygoski* purports not to do so.

The reading of *Torncello* by the *Krygoski* court is an unusual, if not unprecedented one. The opinion seeks the meaning of this case not in the plurality opinion, but in the concurring opinion of Chief Judge Friedman. It cites approvingly his view that "when the government enters into a requirements contract, knowing that it can obtain an item the contract covers for less than the contract price and intending to do so, there cannot be a constructive termination for convenience of the government when the government follows that course."[52] None of the

other opinions, however, cite a need to show that the government must *intend* to dishonor the contract at the time it enters into it. As Professor Cibinic points out, there was no record or finding at the Board in *Torncello* to suggest any such intent.[53]

The need for a panel decision to avoid overruling an *en banc* decision such as *Torncello* may explain one of the more innovative and curious features of the *Krygoski* opinion. The lynchpin of this decision is that:

> Recent enactments . . . have underscored rules of Government contracting which render the plurality's *dicta* in *Torncello* inapplicable to the present regime of contract administration. Recent statutes fully address the concerns of the *Torncello* plurality regarding the Government's shopping for lower prices after contract award.[54]

These recent enactments and statutes are really only one—the Competition in Contracting Act ("CICA"), which became law in 1984.[55] The opinion states that by compelling the use of "full and open competition," CICA bounds when a contracting officer should and should not terminate a contract for convenience.[56]

This logic runs as follows. The emphasis of CICA on competition compels a contracting officer to ensure that the government's requirements are properly advertised, and to make efforts to obtain an adequate number of competitors.[57] Termination for convenience permits a second chance when the contracting officer determines that an awarded contract did not result from an adequately competitive process.

But the *Krygoski* court also recognizes the need for additional limits. Termination for convenience to permit a new competition is not justified simply because of the contracting officer's whim, or a change of heart. As the opinion puts it, "[n]ot every necessary alteration of the

contract scope, however, requires a new bid procedure."[58] The test adopted by *Krygoski* is a familiar one—the "cardinal change" doctrine. When the government's needs can only be met by a cardinal change in the contract, then termination for convenience is justified, indeed required, to permit a new contract competition.

This new test deserves to be examined in detail. The first striking feature is its novelty. There have been numerous decisions on the *Torncello* issue since the enactment of CICA in 1984, including several at the Federal Circuit, but none of them made this connection until *Krygoski*.

The second odd feature of Krygoski is its bald assertion that "[i]n 1984, CICA articulated significant factors addressing a contracting officer's decision to terminate a contract for the government's convenience."[59] Indeed, neither the phrase "termination for convenience," nor the concept of a unilateral right to walk away from an agreement at minimal cost, appears anywhere in CICA. The idea of a connection between convenience termination and the requirement for competition is, so far as can be determined, entirely an innovation of the *Krygoski* opinion.

But the most interesting aspect of *Krygoski* is its notion that CICA altered the legal landscape in a way that gave new meaning to the government's authority to terminate for convenience. This idea permits the opinion to sidestep the troublesome problem of whether it is overruling the *en banc* opinion in *Torncello*. However, the legal innovations which *Krygoski* attributes to CICA are not really new at all. Without exception, CICA simply did not alter the law in the ways the opinion suggests.

According to the opinion, the major new feature of CICA with implication for convenience terminations is the requirement for "full and open competition."[60]

However, the pre-CICA regulations, which had the force and effect of law, already required "maximum practicable competition."[61] Although the CICA standard seems more absolute, in practice there is no meaningful distinction between these two formulations.[62] Both are strong pro-competitive standards.

The next feature of CICA raised by the opinion is that it led to regulations which "may compel a new bid" if "a contracting officer discovers that the bid specifications inadequately describe the contract work."[63] Again, however, the post-CICA regulations are indistinguishable from what went before. The test for cancellation of a solicitation and reopening the competition in the post-CICA regulations is a mere rephrasing of the standard which already existed.[64]

The conclusion of the court's analysis is the assertion that, when a contract modification would be beyond the scope of the original contract competition, it requires a new bid procedure. Even this formulation goes too far.

First, the Comptroller General has said on many occasions that such a profound change is not unlawful, if it can be justified under CICA rules as a sole-source contract.[65] There are certainly situations where legitimate considerations of urgency might justify a bilateral modification under the procedures for noncompetitive contracting, even if it is outside the scope of the contract competition.

Second, there are also instances where the government's needs can be satisfied by the award of a second contract to cover what would otherwise be a cardinal change.[66] In both cases, termination of the original contract award would be unnecessary, and so it would not be appropriate for the government to avoid its contractual obligations.

Krygoski goes on to note that a cardinal change, by definition, is a contract modification which goes beyond the scope of the original competition. There is a close correspondence between the cardinal change doctrine and the reasonable expectations of the original bidders or offerors. Indeed, the two concepts may be identical. Krygoski stands for the proposition that termination for convenience is a legitimate escape from a situation which would otherwise develop into a cardinal change.[67]

Krygoski correctly recapitulates the law of cardinal changes. It quotes a 1993 CAFC case which summarizes the test as follows:

> [A cardinal change] occurs when the government effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for.[68]

However, *Krygoski* applies this law in a questionable way. Removal of additional asbestos, when a significant amount was already expected, hardly seems "drastic" or "materially different." The contracting officer testified that the termination for convenience was motivated by a cardinal change resulting from the "discovery" of additional asbestos to be removed during demolition.[69] The government applied a "rule of thumb" that an increase in price of about 33 percent would constitute a cardinal change.[70] The trial court scoffed at this justification, citing case law which held that under proper circumstances, more than doubling the contract price is not itself determinative of a cardinal change.[71]

The appellate court, however, found the contracting officer's views persuasive. It was impressed that "[a]sbestos removal, originally about 10%, became about 50% of the contract work."[72] This change in proportion might have induced "different bidders, like asbestos removal firms," to enter the competition, the court specu-

lated. Since the additional asbestos removal was in the floor tile, rather than the insulation materials called out in two contract line items, the CAFC concurred that this amounted to a material departure from the scope of the original procurement.

This conclusion is a hard pill for practitioners to swallow. Construction contracts are notorious for being richly veined with changes, suspensions, differing site conditions, and other entitlements to additional compensation. It is expected, for example, that an excavating contractor which encounters an underground spring or a rock ledge will, after notice and direction, continue the work and claim the increased costs. Demolition of old, abandoned, and vandalized structures, like the ones involved in *Krygoski*, also may be reasonably expected to have unforeseen conditions and problems, and the presence of additional asbestos should have surprised no one. The contract did call out in two line items the removal of asbestos insulation, but the third line item was for "Demolition, Removal, and Disposal" of the structure itself. Why shouldn't the removal of undisclosed asbestos amount to a constructive change in "the specifications (including drawings and designs)" or "the method or manner of performance of the work," or even in "the Government-furnished . . . site," as provided for in the standard Changes clause used in defense contracts at the time?[73]

Krygoski is not persuasive. It effectively overrules *Torncello*, although the panel did not have this authority. The "cardinal change" test is no improvement over the "changed circumstances" test, and its basis in CICA is spurious. Finally, *Krygoski* even misapplies the "cardinal change" doctrine it invokes.

IV. The Future of Termination for Convenience

"There must be some way out of here,"
Said the joker to the thief,
"There's too much confusion,
I can't get no relief."

—Bob Dylan, *All Along the Watchtower*.

If the Supreme Court grants Krygoski's petition for *certiorari*,[74] the resulting opinion might clarify matters. Since the odds are against this eventuality, the contracting community needs to consider how to adjust to this latest ruling on the scope of the government's power to terminate a contract for convenience. Some routes are foreclosed. So long as the termination clause remains mandatory and (nearly) universal, there is little prospect of negotiating limits during the contract formation process on the use of convenience termination during contract performance.

A. The Continuing Need for Limits

Does *Krygoski* leave us with any meaningful limits on the government's rights to terminate for convenience ?

Apparently not. *Torncello* appears to be the first case in which a contractor actually succeeded in obtaining a ruling that a termination for convenience was (or would be) improper, and that it was entitled to breach damages against the sovereign. If the Federal Circuit now discards the "changed circumstances" test of the *Torncello* plurality, we are likely to return to the days before it was decided. There will be a theoretical limit to the government's power to terminate for convenience (bad faith or abuse of discretion), but it would be so remote, a contractor could not realistically expect to prove it had been transgressed.

For the reasons set forth above, we do not think that the answer to this conundrum is found in Chief Judge Friedman's concurrence. There seem to be two points on which a majority of the *Torncello* judges agreed (apart from the actual judgment). First, four judges—the plurality and Judge Davis—explicitly overruled *Colonial Metals*. Second, the concurring opinion of Judge Davis can be squared with the plurality opinion, if one takes into account a dispute over mere nomenclature.

The basic division between the plurality and two of the three concurring opinions is over what is and is not sufficient to constitute "bad faith" (Davis) or "abuse of discretion" (Nichols). The plurality does not define these terms as broadly as these two concurring judges, and so they express their ruling in other terms.

However, a majority of four judges espoused in some form the "changed circumstances" test, although they parted ways over whether the situation in *Torncello* amounted to bad faith. Judge Davis would hold the government liable where it terminates the contract to take advantage of a better price known before award of a requirements contract. The lack of a changed circumstance is implicit in the pre-existing knowledge, and thus is critical to the result. A major dispute between Judge Davis and the plurality opinion is over the issue of whether the government could properly terminate a contract to take advantage of a better price appearing for the first time after contract award. Judge Davis's objection to the plurality's *dictum* that this would be improper points out that "a better price appearing [after contract execution] appears to be . . . a change in conditions."[75] Thus, a faithful reading of *Torncello* finds a majority of the judges in favor of requiring *some* change in circumstances before approving a termination for convenience.

It is harder to square Judge Nichols's opinion with the others. He stresses the "all or none" aspect of the

contract, and finds it improper for the government to terminate a portion of such a contract to enjoy a better price, while retaining the benefit of the rest of the contract. The government's foreknowledge of this better price is never mentioned, and so Judge Nichols seems at odds with both the plurality and with Judge Davis's decision.

Returning to a "changed circumstances" test will not immediately answer all questions; the facts of *Torncello* do not embrace every eventuality. But it is a better starting point than the "intent" test of Chief Judge Friedman's concurrence, or the "cardinal change" standard of the *Krygoski* opinion.

The "changed circumstances" test can be revived, for example, by an *en banc* decision of the Court of Appeals for the Federal Circuit. Since contractors have little recourse save aggressive litigation, there will be opportunities for such a ruling.

Another route to meaningful limits would be through a change to the Federal Acquisition Regulation. A subcommittee of the American Bar Association Section of Public Contract Law is pursuing this prospect. However, it is questionable that the government is or will be motivated to limit its currently broad powers to stop contract performance without fear of liability for expectation damages.

B. 'Abuse of Discretion' in Default Termination: a Curious Result

A curious anomaly results from the use of the constructive termination doctrine as a damage limitation device.[76] This arises from the situation where a contractor is in technical default of a contract, but the termination of that contract for default would be an abuse of discretion. On this basis, default terminations have been reversed where they were motivated by a desire to rid the

government of dealing with the contractor,[77] or to end a troubled program.[78] When that happens, the default termination is converted to one for the convenience of the government.[79] The abuse of discretion which characterized the termination for default does not taint the government's actions sufficiently to deny it the benefits of a termination for convenience.

This can lead to a questionable result. In *Torncello,* for instance, the government breached a requirements contract by diverting the fulfillment of some of its needs to another source. Assume instead that it had terminated that portion of the contract for default. This termination would have been without cause, and presumably would have been an abuse of discretion. Under the above doctrine, however, the improper default termination would merely have become one for convenience.[80] Why should the government be better off when it improperly terminates a contract for default than when it improperly terminates a contract for convenience?

One answer might be that the government actually has a broader scope of discretion to terminate for convenience than for default, and this seems a reasonable premise. However, the case law dealing with abuse of discretion in default terminations needs to recognize this issue. After concluding that the termination for default was an abuse of discretion, the court or board then needs to consider whether a convenience termination under the same circumstances would also be improper, and therefore whether the proper remedy is damages for breach of contract.

C. Litmus Test for Commercial Practices?

Barring a reversal of *Krygoski,* there could still be legislative or regulatory action to return terminations for convenience to their original realm, i.e., contracts for weapons systems or other uniquely governmental needs. Even in this limited sphere, the issue of limits to the

power to terminate for convenience would still arise. But it would happen much less frequently, and in a context where the government's interests were more compelling.

Restricting the termination for convenience clause to only some contracts is consistent with the current trend to "commercialize" government procurement. A unilateral right to disavow obligations, without answering in money damages, is rare or unheard of in commercial contracts. To be sure, some commercial contracts include a cancellation right. But these almost always require advance notice and are either exercisable by either party or restricted to contracts where cancellation would have little or no impact on the terminated party.

The FAR now permits contracts for commercial items to be "tailored" to customary commercial market practices.[81] The FAR lists certain provisions which cannot be altered. However, the termination for convenience clause is not on this list, and so it *can* be modified for, or even excluded from, contracts for commercial items.

However, the regulations for procuring commercial items do include a "standard," but nonmandatory termination provision, which perpetuates the government's right to terminate a contract for its convenience.[82] When a commercial item contract is terminated for convenience, the contractor's recovery is limited to "a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system. . . ."[83] In other words, no anticipatory profit.

As the federal government increasingly attempts to mimic commercial practices in its procurement operations, it will be interesting to see whether it is willing to shed advantageous, government-specific features like termination for convenience. Whether the contract con-

tains such a clause may be a simple but effective test for whether a contract is truly "commercial."

Endnotes

1 No. 214-89C (Fed. Cl. March 2, 1993, 1993 WL 840295 (Fed. Cl.), *rev'd*, 94 F.3d 1537 (Fed. Cir. 1996), *petition for cert. filed*, No. 96-1236 (Feb. 5, 1997).

2 *Torncello v. U.S.*, 618 F.2d 756, 764 (Ct. Cl. 1982).

3 91 U.S. 321 (1876). The court's opinion mentions "the improvements constantly made in ship-building and steam machinery and in arms . . . ." 91 U.S. at 323.

4 2 *Nash & Cibinic, Federal Procurement Law* 1107 (3d ed. 1980).

5 *Id.* at 1104.

6 *G.L. Christian & Assocs. v. U.S.*, 312 F.2d 418, 426 (Ct. Cl.), *reh'g denied*, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963).

7 *See General Eng'g & Mach. Works v. O'Keefe*, 991 F.2d 775 (Fed. Cir. 1993); *G.L. Christian & Assocs. v. U.S.*, *supra*.

8 *2 Nash & Cibinic, Federal Procurement Law*, *supra*, at 1121-26.

9 *See, e.g., John Reiner & Co. v. U.S.*, 325 F.2d 438, 442 (Ct. Cl. 1963) ("[I]n absence of bad faith or a clear abuse of discretion the Contracting Officer's election to terminate is conclusive."), *cert. denied*, 377 U.S. 931 (1964).

10 *See, e.g., Sanders v. U.S. Postal Serv.*, 801 F.2d 1328, 1331 (Fed. Cir. 1986).

11 *Kalvar Corp. v. U.S.*, 211 Ct. Cl. 192, 198 (1976), *cert. denied*, 434 U.S. 830 (1977).

12 *See U.S. Fidelity & Guar. Co. v. U.S.*, 230 Ct. Cl. 355, 369 (1982).

13 494 F.2d 1355 (Ct. Cl. 1974).

14 *Id.* at 1361.

15 Consideration is, of course, an essential element of a valid, enforceable government contract. *See Simpson v. U.S.*, 172 U.S. 372 (1899); *Willard, Sutherland & Co. v. U.S.*, 262 U.S. 489 (1923).

16 681 F.2d 756 (Ct. Cl. 1982) (*en banc*).

17 Ronald A. Torncello was the president and later trustee in bankruptcy of Soledad Enterprises Inc.

18 Constructive termination for convenience is a judicial doctrine that may be invoked to excuse the government's action to terminate a contract when the basis upon which a contract was terminated was legally inadequate to justify the government's termination. This doctrine evolved from *College Point Boat Corp. v. U.S.*, 267 U.S. 12 (1925), in which the Supreme Court held that actions by a contracting party may be supported at a later date by any reason that could have been advanced at the time of the actions, even though the party was not then aware of it.

19 The short form termination for convenience clause in *Soledad* is essentially the same as FAR 52.249-4 (Termination for Convenience of the Government (Services)) (Short Form).

20 *See Soledad Enters. Inc.*, ASBCA Nos. 20424 *et al.*, 77-2 BCA ¶ 12,552. Under the FAR's standard (long form) termination for convenience clause, FAR 52.249-2, Soledad likely would have recovered the usual termination costs.

21 *Torncello*, 681 F.2d at 773.

22 *Id.* at 760. The idea that an unlimited power to terminate for convenience would undermine the enforceability of a contract seems to derive from Professors Nash and Cibinic. *See* 2 *Nash & Cibinic, Federal Procurement Law, supra*, 1115 n. 5.

23 *Id.*

24 *Id.*

25 10 Nash & Cibinic Report ¶ 52 (Oct. 1996).

26 *See, e.g., S & W Tire Servs., Inc.*, GSBCA No. 6376, 82-2 BCA ¶ 16,048.

27 14 Cl. Ct. 733 (1988).

[28] *Id.* at 736.

[29] 17 Cl. Ct. 47 (1989), *aff'd*, 905 F.2d 1518 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991).

[30] 17 Cl. Ct. at 58. *See also Biener GmbH v. U.S.*, 17 Cl. Ct. 802 (1989) (changed circumstances rule not applicable in absence of short form termination for convenience clause and knowledge at time of contracting that work could be obtained from another source at cheaper price.)

[31] 905 F.2d at 1521.

[32] 55 F.3d 1578 (Fed. Cir. 1995).

[33] *Id.* at 1582.

[34] GSBCA No. 10186-P, 90-1 BCA ¶ 22,332.

[35] Effective Oct. 1, 1982, the U.S. Court of Claims was abolished and was replaced by the U.S. Court of Appeals for the Federal Circuit and a new U.S. Claims Court. Federal Courts Improvement Act of 1982, PL 97-164, §§101, 171-77, 96 Stat. 25, 27-28 (1982). The Claims Court was renamed the U.S. Court of Federal Claims effective October 29, 1992. Federal Courts Administration Act of 1992, PL 102-572, Title IX, §902(b), 106 Stat. 4506, 4516 (1992).

[36] 7 Cl. Ct. 43 (1984).

[37] *Id.* at 45.

[38] *Id.* at 47.

[39] 847 F.2d 1549 (Fed. Cir. 1988).

[40] IBCA No. 1828, 86-2 BCA ¶ 18,888.

[41] 847 F.2d at 1555.

[42] *Stoner-Caroga Corp. v. U.S.*, 3 Cl. Ct. 92, 96 (1983).

[43] *Peck Iron & Metal Co. v. U.S.*, 603 F.2d 171, 172-73 (Ct. Cl. 1979).

[44] ASBCA No. 25692, 84-2 BCA ¶ 17,460.

[45] *Id.* at 86,977.

46 *Id.*

47 *Krygoski Constr. Co. Inc. v. U.S.*, No. 214-89C (Fed. Cl. March 2, 1993), 1993 WL 840295 (Fed. Cl.).

48 *Id.* at 9.

49 *Krygoski Constr. Co. Inc. v. U.S.*, 94 F.3d 1537, 1545 (Fed. Cir. 1996).

50 *Id.*

51 *See South Corp. v. U.S.*, 690 F.2d 1368, 1370 n.2 (Fed. Cir. 1982) (Court of Claims decisions are binding precedent unless and until overruled by the Federal Circuit sitting *en banc*).

52 681 F.2d at 773. This statement was also cited approvingly in *Salsbury* and *Caldwell & Santmyer*.

53 10 Nash & Cibinic Report ¶ 52 (Oct. 1996).

54 94 F.3d at 1542.

55 PL 98-369, 98 Stat. 1175 (1984), codified as amended at 10 USC §§2304 *et seq.*; 41 USC §§251 *et seq*. Actually, CICA was only two years old when Krygoski's contract was terminated for convenience.

56 94 F.3d at 1542-43.

57 More modern thinking, however, posits that this emphasis on competition is outmoded and inefficient, and that the wisdom and judgment of government officials adequately protects the taxpayer's interests.

58 94 F.3d at 1543.

59 *Id.* at 1542.

60 The opinion cites in this regard 41 USC §253(a)(1)(A), 401, 405(a) & 416 and 10 USC §2304.

61 Defense Acquisition Regulations 1-300.1, 32 C.F.R. § 1-300.1 (1983); Federal Procurement Regulations 1-1.301-1, 41 C.F.R. § 1-1.301-1 (1983).

62 For instance, DAR 1-1.1001 required that proposed procurements be publicized "to increase competition." However, a standard of competition to the "maximum practicable extent"

has been held to justify restricting the number of offerors solicited for small purchases. *See S.C. Servs. Inc.*, B-221012, March 18, 1986, 86-1 CPD ¶ 266.

63 94 F.3d at 1543.

64 *Compare* FAR 15.606 *with* DAR 3-805.4 and FPR 1-3.805-1(a) (negotiated procurements); *compare* FAR 14.209 *with* DAR 2-209 and FPR 1-2.208 (advertised procurements).

65 *See, e.g., Corbin Superior Composites Inc.*, B-234019; B-235019.2, July 20, 1989, 89-2 CPD ¶ 67; *Indian & Native Am. Employment & Training Coalition*, B-216421, April 16, 1985, 85-1 CPD ¶ 432; *W.H. Mullins*, B-207200, Feb. 16, 1983, 83-1 CPD ¶ 158.

66 *Cf. Hunkin Conkey Constr. Co. v. U.S.*, 461 F.2d 1270 (Ct. Cl. 1972).

67 However, in *International Electronics Corp. v. U.S.*, 646 F.2d 496 (Ct. Cl. 1981); *appeal after remand*, 2 Cl. Ct. 570, *aff'd*, 727 F.2d 1120 (Fed. Cir. 1983), the court stated that conversion of the termination from default to convenience made it unnecessary to consider whether the government's failure to provide certain promised equipment for contract performance amounted to a cardinal change.

68 *AT&T Communications Inc. v. WilTel Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993).

69 *Krygoski*, slip. op. at 20.

70 *Id.* at 19.

71 *General Dynamics Corp. v. U.S.*, 585 F.2d 457, 466 (Ct. Cl. 1978); *see also Reliance Ins. Co. v. U.S.*, 931 F.2d 863 (Fed. Cir. 1991) (over 200 change orders do not amount, cumulatively, to a cardinal change).

72 94 F.3d at 1544.

73 CHANGES (1968 FEB), DAR 7-602.3(a), 32 C.F.R. § 7-602.3(a) (1983).

74 *See Federal Contracts Report*, Vol. 67, No. 8, Feb. 24, 1997, pp. 221-22.

75 681 F.2d at 684.

76 We are indebted to Alan V. Washburn Esq. for bringing this anomaly to our attention.

77 *Darwin Constr. Co., Inc. v. U.S.*, 811 F.2d 593 (Fed. Cir. 1987).

78 *McDonnell Douglas Corp. v. U.S.*, 35 Fed. Cl. 358 (1996).

79 *Darwin Constr. Co., Inc.*, 811 F.2d at 594; *McDonnell Douglas Corp.*, 35 Fed. Cl. at 369.

80 Since Soledad's contract contained a short form termination for convenience clause, it was entitled to no recovery at all. *Torncello*, 681 F.2d at 759-60.

81 FAR 12.302.

82 FAR 52.212-4.

83 FAR 12.403(d); FAR 52.212-4(1).